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82-468

No.

In the Supreme Court of the United States

October Term, 1982

WILLIAM J. McNEA, *et al.*,
Petitioners,

vs.

GEORGE VOINOVICH, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ohio Supreme Court violates the due process clause of the Fourteenth Amendment to the United States Constitution by *sua sponte* raising and reversing the lower court upon a heretofore unreversed factual finding of the trial court, finding error as a matter of law where:

(1) Such factual finding is not raised as error in that court by the appellant;

(2) said factual finding depends solely upon the weight of the evidence and the record of the proceedings below does not contain any of the evidence offered which supports the factual finding of the trial court;

(3) the Rules of Practice of the Ohio Supreme Court place the burden upon the appellant in that court to present each error complained of in the courts below and bring forth that part of the record of proceedings below evidencing such error.

PARTIES

The Petitioners to this action are:

William J. McNea and Paul Jurcisin, Officers and members of the Cleveland Police Patrolmens Association, sworn classified employees of the City of Cleveland, Division of Police, holding the rank of Patrolman, and taxpayers of the City of Cleveland,

and

The Cleveland Police Patrolmens Association which is recognized by the City of Cleveland as the sole and exclusive collective bargaining agent on behalf of all of the Cleveland Police Department police officers, below the rank of Sergeant.

The Respondents to this action are:

George Voinovich, Mayor, City of Cleveland,

Thomas Wagner, Law Director, City of Cleveland (resigned),

Jack Cross, Treasurer, City of Cleveland,

Willard Largent, Safety Director, City of Cleveland (resigned),

Vincent Amato, Acting Safety Director, City of Cleveland (resigned),

The City of Cleveland, an Ohio municipal corporation, operating pursuant to Charter,

James Conrad, Personnel Director, City of Cleveland,

William J. Brown, Attorney General, State of Ohio,

Jeffrey Comfort and Gary N. Neid, employees of the City of Cleveland and as class representatives on behalf of a certified class of employees of the City of Cleveland,

Alan Schneider, Commissioner of Accounts, City of Cleveland,

The Cleveland Civil Service Commission,

Thomas R. Skulina, President, Cleveland Civil Service Commission,

Mary R. Bubna, Member, Cleveland Civil Service Commission,

Edward H. Mason, Secretary, Cleveland Civil Service Commission (resigned),

P.L. Fenderson, Member, Cleveland Civil Service Commission,

Edward J. Turk, Member, Cleveland Civil Service Commission.

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OPINIONS BELOW

The order and judgment of the Ohio Supreme Court denying rehearing is unreported, but is reproduced in the Appendix, page A21.

The decision and opinion of the Ohio Supreme Court is reported as *McNea v. Voinovich* (1982), 70 Ohio St. 2d 117 and is reproduced in the Appendix, pages A1 to A7.

The decision and opinion of the Ohio Court of Appeals for the Eighth Judicial District is unreported but is reproduced in the Appendix, pages A8 to A15.

The decision and judgment of the Ohio Court of Common Pleas for Cuyahoga County is unreported but is reproduced in the Appendix, pages A16 to A20.

JURISDICTION

The decision of the Ohio Supreme Court was entered on May 26, 1982. Rehearing was denied on June 23, 1982. Jurisdiction is conferred by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 14, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

City of Cleveland officials determined in August of 1980 that the City's General Fund faced a projected $8.4 million deficit for the fiscal year 1981. After failing to cure such projected deficit by failing to pass an income tax increase in a general election, City officials designed a lay-off plan in conjunction with cutbacks in employee overtime to balance the 1981 budget.

The lay-off plan called for laying off 184 employees in eight departments and not replacing 31 other employees who were leaving the City's employment for reasons other than lay-off. Included within the lay-off plan were 53

police officers employed in the Department of Public Safety. All 184 employees proposed to be laid off and the 31 employee vacancies not to be filled are compensated solely through the City's General Fund. Ninety-four of the employees scheduled to be laid off were regular appointees[1] in the Civil Service of the City, while 90 of the employees to be laid off were temporary appointees[2] in the Civil Service of the City.

The General Fund is the largest of 29 City funds. The lay-offs did not extend to any of the employees who are paid through the 28 remaining "special funds" for the reasons that those "special funds" were either (1) balanced for 1981, (2) their revenues by contract or otherwise were restricted, or (3) had internal service funds created by transfers of monies from other funds.

It was determined that at least 681 of the City's 1,100 temporary appointees were paid through the General Fund.

Based upon a long history of temporary appointees being retained on the General Fund in apparent violation of Cleveland Charter Sections 130 and 135 and the potential jeopardy to the health, safety, welfare, and morals of the taxpayers of the City of Cleveland should the lay-off of 53 basic police officers occur, Petitioners, as taxpayers, commenced the within cause on December 3, 1980.

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1. Regular appointments are made from certified eligibility lists created by the Cleveland Civil Service Commission pursuant to competitive testing; See Sections 131 and 133 of the City Charter, Appendix A22, and Cleveland Civil Service Commission Rules 6.20 through 6.60, Appendix A24.

2. Temporary appointments are made without competitive testing nor certified eligibility lists and are limited to no more than 90 days at which time they must be tested or terminated; See City Charter Sections 130 and 135, Appendix A23, Cleveland Civil Service Commission Rules 6.70 through 6.75, Appendix A26.

The Petitioners initiated the within action by filing their Complaint in the Court of Common Pleas for Cuyahoga County, Ohio, alleging causes of action for declaratory and injunctive relief seeking to prohibit the lay-off of the 53 police officers while the City maintained on its General Fund payroll the many hundreds of temporary appointees in employment beyond the 90 day time period Petitioners allege was the maximum permitted by City Charter. A second and alternative cause of action sought to enjoin the lay-off of the police officers in that such lay-offs were excessive and as such jeopardized the health, safety, welfare and morals of the taxpayers and citizens of the City of Cleveland.

Thereafter, the Petitioners joined as a defendant class all temporary appointees on the Respondent City's General Fund, class representatives were designated, and evidence was taken by the court leading to the granting of the Petitioner's Motion for Preliminary Injunction halting the anticipated lay-offs. Subsequent thereto, the Trial Court held its full hearing on the merits of Petitioner's request for permanent injunctive relief only as contained in their Third Amended Complaint and granted the same (Appendix pages A33 to A44).

The Trial Court made two separate findings each of which independently supported its order granting the Petitioner's request for permanent injunctive relief.

First, the Trial Court found at paragraph G(3) of its Judgment Entry (Appendix page A18) that the aforementioned 681 temporary appointees held their position contrary to law thereby granting Petitioners the relief they sought in their first cause of action. Secondly, the Trial Court specifically found at paragraph K(2) of its Order:

> "That the evidence overwhelmingly establishes the present inability of the Cleveland Police Department to fulfill the responsibilities with which it is charged and which it once so admirably performed and that the proposed lay-offs of police personnel would jeopardize the health, safety, morals and welfare of the City, the residents and taxpayers thereof."

Such factual finding substantiated the allegations contained in the Petitioners' second cause of action.

Thereafter, the Respondents appealed to the Ohio Court of Appeals for the Eighth District which unanimously affirmed the judgment of the Trial Court (Appendix page A8). Respondents then appealed to the Ohio Supreme Court which reversed the lower court.

Petitioners filed their Motion for Rehearing contending that the Ohio Supreme Court had *sua sponte* raised, reviewed and found erroneous as a matter of law an unreversed factual finding of the Trial Court (the jeopardy to the health and safety of the taxpayers) not assigned as error by Respondents and without the benefit of the evidence in the record supporting such finding. The Motion was denied.

It is imperative that this Court recognize from the outset that the sole error Respondents brought before the Ohio Supreme Court was the Court of Appeals' construction of City Respondents' Charter Sections 130 and 135. Though the Respondents raised as error the factual findings of the Trial Court as to the health safety issue before the Ohio Court of Appeals, the record prepared by Respondents before the Ohio Supreme Court was void of any of the evidence offered by the Petitioners leading to such factual finding by the Trial Court. Furthermore, at no time did Respondents raise as error before the Ohio Supreme Court the manner in which the Court of Appeals dealt with such health safety issue. The reason why

they did not is clear. Respondents in their Brief to the Ohio Supreme Court stated with no uncertainty that "They will forego raising this issue in their appeal." (Appendix page A45).

Therefore, in the absence of the Respondents' raising as error the factual finding of the Trial Court that the lay-off of the patrol officers would jeopardize the health, safety, morals and welfare of the citizens of Cleveland, such determination stood unreversed before the Ohio Supreme Court. As such finding independently supported the Trial Court's issuance of its injunction, and the Ohio Supreme Court had no record containing the evidence offered on the health safety issue upon which to reverse the lower court, the Ohio Supreme Court was bound to affirm the Court of Appeals.

The effect of the Ohio Supreme Court's action was to violate the due process rights of the Petitioners thereby creating for the first time the Constitutional issue sought for review herein.

This Court has previously held that a federal claim first raised by petition for rehearing in a State court is timely for purposes of review if the occasion for it arose unexpectedly from the grounds of the State court's decision. *Great Northern Railway v. Sunburst Oil & Refining Co.* (1932), 278 U.S. 358; *Herndon v. Georgia* (1935), 295 U.S. 441. This Court has also recognized that "the federal guaranty of due process extends to State action through its judiciary as well as through its legislative, executive, or administrative branch of government." *Binkerhoff-Faris Trust & Savings Co. v. Hill* (1929), 281 U.S. 673. Therefore, the actions of the Ohio Supreme Court are subject to and ripe for review by this Court, the constitutional issue first being created by that Court's decision.

REASONS FOR GRANTING THE WRIT

The instant case presents an important issue of Constitutional law concerning a decision of the Ohio Supreme Court in which the Court disregarded its own Rules of Practice thereby denying Petitioners herein due process of law.

It is respectfully submitted by Petitioners that the Rules of Practice of the Ohio Supreme Court fall within those "processes due" individuals within the meaning of the Fourteenth Amendment to the Constitution of the United States. See, generally, *Mathews v. Eldridge* (1976), 424 U.S. 319, 47 L. Ed. 2d 18, 98 S. Ct. 893; *Boddie v. Connecticut* (1971), 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780. Given that, it is a matter of fundamental fairness to permit litigants to prepare and submit appeals to the Ohio Supreme Court in reliance upon the expectation that there will be strict uniform adherence to such Rules by the Court, and the ordinary presumptions which appellate courts practice on appeal.

Rule IV of the Ohio Supreme Court Rules of Practice defines the mandatory responsibilities of the parties in preparing and filing their individual records in that Court of the proceedings below.

"RULE IV COPIES OF RECORD IN MERIT CASES

"Section 1. Portions Required.

The appellant in all civil cases must file for the use of the Court and Reporter eighteen copies of so much of the record, testimony and exhibits as may be necessary to be considered by the Court to determine the questions presented.

"Section 3. Additional Record.

A party opposing an appeal must, within the time limited for filing his brief, file eighteen copies of such additional portions of the record, testimony and exhibits as he will rely on."

Rule V sets out the briefing requirements for both Appellant and Appellee. However, the responsibilities of the parties are different.

"RULE V BRIEF ON MERITS IN APPEAL CASES

"Section 1. Appellant's Brief.

"The appellant's brief must comply with Rule VI and contain:

"(A) A table of contents listing the table of authorities, statement of facts, argument (with the proposition or propositions of law and authorities relied upon to support the same) and appendix, all as required by the following subparagraphs of this rule, with references to the pages of the brief where each appears, and arranged as shown by the following sample:

. . .

"(D) An argument, which shall be headed by the proposition of law which the appellant contends is applicable to the facts in the case and which, if he prevails, could serve as a syllabus. See paragraph three of the syllabus of *Drake v. Bucher, Supt.* (1966), 5 Ohio St. 2d 37, 213 N.E.2d 182. If several propositions of law are contended for, the argument shall be divided by utilizing each proposition as a subheading.

. . .

"Section 2. Brief Opposing Appeal.

"Within thirty days of the filing of appellant's brief, the party opposing the appeal shall file a brief in form complying with the provisions of this rule and Rule VI and answering the appellant's contentions and making any other contentions deemed appropriate as reasons for affirmance of the order or judgment appealed from."

Rule IV clearly places an express burden upon the appellant to submit only that evidence necessary for the court to determine the errors presented for review. Likewise, another burden rests upon the appellant under Rule V to set out the specific errors raised for review. If necessary, the appellee may supplement the record under Rule IV with additional evidence in support of his argument opposing the appeal.

Implicit within these rules is a reliance factor in favor of the appellee that the scope of the appeal will be limited to that evidence and assigned errors submitted by the appellant and whatever additional portions of the record the appellee will rely upon.

This "burden" and "reliance" concept has been expressly recognized by the Ohio Supreme Court. *Ostrander v. Parker-Fallis Insulation Co., Inc.* (1972), 29 Ohio St. 2d 74; *Lynch v. Doran* (1968), 13 Ohio St. 2d 9; Rule 9, Ohio Rules of Appellate Procedure. The Ohio Supreme Court stated in *Ostrander* at 74:

"Finally, appellant contends that the evidence adduced at trial was insufficient to establish that Lavelle was acting in the course and scope of his employment. However, appellant filed only a partial bill of exceptions in the Court of Appeals. It was not certified as containing all of the evidence adduced on the issue of

respondeat superior. In effect, appellant would have us shift the burden to appellee to complete the partial bill of exceptions when the challenge goes to the insufficiency of the evidence to support the judgment upon a particular issue. This is not the rule."

This burden is placed upon the appellant for a very important reason. In the absence of a complete record of the proceedings below "all reasonable presumptions consistent with the record will be indulged in favor of the regularity and legality of the proceedings below." *Furnishings for Courtroom Two* (1981), 66 Ohio St. 2d 427; *Ostrander v. Parker-Fallis Insulation Co., Inc., supra; Beach v. Sweeney* (1958), 167 Ohio St. 477; 4 OHIO JURISPRUDENCE 2d Appellate Review §§248,552 and 553.

While it is clear that the Ohio Supreme Court and the lower Ohio appellate courts can raise and determine errors in the record which they discover but which have not been specifically raised by appellants, See e.g. *Garrison Carpet Mills v. Lenest, Inc.* (1979), 65 Ohio App. 2d 251; §2505.21 Ohio Revised Code, a prerequisite to judicial review is the existence of the evidence in the record supporting that discovered error. In absence of that evidence, the presumption of regularity and legality of the proceedings below must be indulged by the Court. *Furnishings for Courtroom Two, supra.*

The record before the Ohio Supreme Court was void of any of the evidence offered by the Petitioners to the Trial Court on the jeopardy to the health and safety of the citizens of Cleveland should the lay-offs occur. The reason why is clear. All Respondents in their Brief on the merits stated with no uncertainty that "they will forego raising this issue in their appeal." (Respondents' Brief, Appendix page A45). Under the provisions of Rules IV and V of

the Rules of Practice of the Ohio Supreme Court, Petitioners were under no obligation to supplement Respondents' record before the Ohio Supreme Court with the additional evidence offered on an issue (health-safety) which the Respondents knowingly chose not to pursue before that Court. Rather, Petitioners justifiably relied upon Respondents' record.

There can be no question but that the Respondents understood and recognized the health-safety issue as they thoroughly briefed it before the Ohio Court of Appeals. Yet, even after Petitioners filed their Brief in the Ohio Supreme Court raising the lower Court's findings on the health-safety issue as an independent basis for affirming the Court of Appeals, Respondents *still failed* to supplement or amend their record or brief this issue in any manner. The only logical conclusion is that Respondents chose not to pursue that issue before the Ohio Supreme Court and were satisfied with the treatment received from the lower courts. What lends force to this argument is that the Ohio Court of Appeals for the Eighth District, Appendix page A8, indicates that there were other important issues in addition to the health-safety issue which Respondents initially assigned as error before the Ohio Court of Appeals, but chose not to raise before the Ohio Supreme Court. One such issue was the timeliness of the demand by the Petitioners to the City Law Director to commence suit, a jurisdictional issue.

Therefore, for the Ohio Supreme Court to state unequivocally that it cannot accept the Trial Court's unreversed conclusion that the lay-off of the police officers would endanger the health, safety, welfare and morals of the citizens of Cleveland as a matter of *law* without first reviewing all of the evidence presented by the Petitioners which resulted in this factual finding, violates the Ohio Supreme Court's own express Rules of Practice and nulli-

fies the long line of decisions of that Court which require the Court, in the absence of a complete record, to indulge all reasonable presumptions of the regularity and legality of the proceedings below. This is especially true when the unreversed conclusion goes to the weight of the evidence.

The principle Petitioners espouse is so constitutionally fundamental that Petitioners are unable to locate a single decision of this Court where the binding effect of a State appellate court's rules of practice upon the court itself has been reviewed.

In *Yturbides Executors v. United States* (1859), 63 U.S. 290, this Court stated:

> "It must be admitted that, as to the matter of filing papers and the entry of rules under the practice of the court, such modifications may be made as may facilitate the progress of the court and the convenience of the parties; and, indeed, the court may, under peculiar circumstances, avoid an act of injustice by the suspension of its rules; but this can only be done where the discretion of the court may be fairly exercised."

In *Rio Grande Irrigation and Colonization Company v. Gildersleeve* (1898), 174 U.S. 603, 19 S. Ct. 761 it was held by this Court that a rule of court in which no discretionary power was reserved to the trial judge, is mandatory upon the court and the court could not suspend its enforcement.

> "A rule of law thus authorized and made has the force of law and is binding upon the courts as well as upon parties to an action and cannot be dispensed with to suit the circumstances of any particular case."

Rio Grande Irrigation and Colonization Co. v. Gildersleeve, supra.

It is respectfully urged that the Ohio Supreme Court's determination that an unreversed factual finding by the Trial Court is erroneous as a matter of law without first having the benefit of reviewing all the evidence supporting such finding, abrogates the mandatory Rule requirements of the Ohio Supreme Court Rules of Practice upon an appellant of defining the scope of the appeal. The effect is to shift to the appellee the burden of completing the appellant's record, or rely upon the appellant's record at his own risk.

This would require an appellee to engage in speculation as to which undisturbed lower court findings might be reviewed on the pretense of being a matter of law instead of responding to the record and error presented by the appellant as is expressly anticipated under Rules IV and V of the Ohio Supreme Court Rules of Practice.

It is respectfully urged that fundamental fairness dictates that Petitioners herein have a vested Fourteenth Amendment expectancy interest to rely upon the uniform application of the Rules of Practice of the Ohio Supreme Court. As it pertains to the case at bar, that expectancy interest is found in Petitioners' reliance under Rule IV that the review of the Ohio Supreme Court would be limited to that evidence presented by the litigants in the record of proceedings. That reliance interest does not and cannot anticipate the Ohio Supreme Court characterizing an undisturbed factual finding of the Trial Court not brought as error by the Appellants as an issue to be reviewed as a "matter of law" without first reviewing the evidence supporting such finding.

CONCLUSION

The Ohio Supreme Court has deprived Petitioners of due process of law under the Fourteenth Amendment to the United States Constitution by modifying without prior notice the "process due" Petitioners in the within cause. The specific "process due" Petitioners is the strict adherence by the Ohio Supreme Court to Rules IV and V of its Rules of Practice. In this case, the Court deviated from its own procedures without prior notice to Petitioners.

The modification occurred when the Ohio Supreme Court *sua sponte* raised and reversed the lower Court upon an heretofore unreversed factual finding of the Trial Court finding error as a matter of law where such finding was not assigned as error by the Respondent and without all of the evidence offered supporting such finding.

Petitioners urge this Court to grant their petition for Writ of Certiorari to review the decision of the Ohio Supreme Court in this case.

Respectfully submitted,

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APPENDIX

DECISION AND OPINION OF THE OHIO SUPREME COURT

(Decided May 26, 1982)

No. 81-1108

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

WILLIAM J. McNEA, *et al.*,
Appellees,

vs.

GEORGE VOINOVICH, *et al.*,
Appellants.

APPEAL from the Court of Appeals for Cuyahoga County.

The city of Cleveland (city), on December 3, 1980, issued layoff notices to 184 workers, including 94 regularly appointed civil service appointees and 90 temporary appointees, as a budget balancing measure. Fifty-three police officers were among the group of employees to be laid off. On the same day that the layoff notices were announced, a taxpayers' action was initiated on behalf of the 53 police officers. The officers sought declaratory and injunctive relief prohibiting the city from laying them off. They alleged (1) that the city could not legally lay off classified appointees while it maintained hundreds of untested temporary employees on the payroll beyond the

90-day legal limit established by the city charter for such temporary employees,[1] and (2) that the layoffs of the 53 police officers would jeopardize the health, safety, morals, and welfare of the city, its residents, and taxpayers. The complaint was subsequently amended to include several temporary appointees as new-party defendants, representing the class of untested temporary employees who had worked for the city longer than 90 days.

The trial court granted a preliminary injunction on December 31, 1980, which was followed by a permanent injunction issued on January 15, 1981. The trial court enjoined the city from following through with the police layoffs while temporary employees who had served more than 90 days remained on the city's payroll. The court also premised its grant of injunctive relief on the factual finding that laying off the 53 police officers would jeopardize the health, safety, morals, and welfare of the city, its residents, and taxpayers.

The city [illegible] the new-party defendants appealed to the Court of Appeals. The Court of Appeals affirmed the lower court, determining that the mayor had abused his

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1. The relevant provisions of Cleveland city charter sections 130 and 135 state as follows: Section 130 provides that "[e]ligible lists created by the [Civil Service] Commission shall remain in force not longer than two years. In the absence of an appropriate eligible list, any place may be filled temporarily, without test, for the period limited by the civil service rules, but not exceeding ninety days. During such period the Commission shall hold the necessary tests for filling any such place permanently. * * *"

Section 135 provides that " * * * [t]he Treasurer shall not pay, nor shall the Commissioner of Accounts issue a voucher for the payment of, any salary or compensation to any person holding a position in the classified service unless the payroll or account of such salary or compensation shall bear the certificate of the Civil Service Commission that the persons named therein have been appointed or employed and are performing service in accordance with the civil service provisions of this Charter and the rules established thereunder, * * *"

discretion by ordering the layoffs of classified civil service workers while retaining temporary employees on the payroll for more than 90 days. The court also acquiesced in the finding of the trial court that the city's health, safety, morals, and welfare here jeopardized by the proposed police layoffs, and found that the city's belated attempt to reappoint temporary employees so as to start the 90-day period running anew was ineffective.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Fink, Greene & Hennenberg Co., L.P.A., and Mr. Murray D. Bilfield, for appellees.

Mr. Thomas E. Wagner, director of law, Mr. Mark I. Wallach and Ms. Marilyn G. Zack, for appellants city et al.

Mr. Malcolm C. Douglas, for appellant new-party defendants.

Per Curiam. This appeal presents two issues for decision. The first is whether the proposed layoffs violated the Cleveland city charter (charter), specifically Sections 130 and 135 thereof. The second is whether the proposed layoffs jeopardized the city's health, safety, morals, and welfare.

The Court of Appeals relied on *Gannon v. Perk* (1976), 47 Ohio App. 2d 125 (hereinafter *Gannon* I), to support its ruling on the charter question. The court interpreted *Gannon* I as finding that the Cleveland city charter "prohibited the City from retaining temporary employees in excess of ninety days unless they became regular appointments by competitive examination * * *." *Gannon* I, however, was appealed to this court, which reversed the Court of Appeals in part on procedural grounds in *Gannon v. Perk* (1976), 46 Ohio St. 2d 301 (*Gannon* II). In *Gannon* II

this court expressly reserved the question of "whether employment of the temporary employees * * * violated the provisions of the Charter of the city of Cleveland." *Id.* at 213, fn. 3. Nevertheless, the Court of Appeals' reliance on the substantive interpretation of the city charter in *Gannon* I is questionable in light of language used by this court in *Gannon* II. We stated the following in *Gannon* II at pages 312-313.

"In *State, ex rel. Buckman v. Munson* (1943), 141 Ohio St. 319, 326, the court concluded that public employees may be laid-off for reasons of economy 'notwithstanding statutory or charter provisions to the effect that no employee in the classified service shall be removed except for cause * * *, the view * * * being that such statutory or charter provisions * * * are not intended to restrict the public authorities in their efforts to effect necessary or desirable economies.'

"The reasoning of the court in *Munson* applies as well to the cause at bar. Lack of funds induced when projected income falls below anticipated expenses is a legitimate basis for laying off civil service employees, including safety personnel, so long as such layoffs are made in conformity with law. In the instant case, then, the issue becomes whether the layoff of policemen and firemen was made in conformity with the ordinances, charter provisions, and civil service rules of the city of Cleveland.

"The charter and ordinances of the city do not establish a mandatory priority for layoffs of municipal employees due to reasons of economy. Therefore, the power to lay off municipal employees must repose within the sound discretion of the mayor of the city, as its chief executive officer, to be exercised in accordance with law."

The principal difficulty in accepting the conclusions of the courts below is, to use appellants' (city of Cleveland *et al.*) phrase, the failure "to recognize the lack of any legal or logical nexus between the allegations relating to the status of persons holding temporary appointments in the absence of eligible lists for their classifications and the injunctive relief requested by plaintiffs." The relationship, if any, between the allegedly improperly retained temporary employees and the layoff notices issued to the 53 police officers is tenuous. (The *Gannon* I court recognized as much, stating in a journal entry clarifying its opinion that the matters of police layoffs and the status of temporary employees were "independent and unrelated issues.")

Appellees are correct in asserting that the city charter Section 130 establishes a 90-day period for untested temporary employees and that Section 135 precludes payment absent "the certificate of the Civil Service Commission that the persons named therein have been appointed * * * in accordance with the civil service provisions * * *." Appellants argue, however, that "[t]he proper remedy of taxpayers or other persons aggrieved by the Civil Service Commission's failure to timely test within 90 days is an order compelling a test. * * * [N]either the failure of the Civil Service Commission to meet that testing deadline nor the failure of an aggrieved party to seek such an order has any legal effect on the status of a temporary appointee." In other words, even if the city has not precisely complied with its own civil service regulations, such non-compliance is irrelevant in the context of the instant case. The status of the 90-day-plus untested temporary employees as employees is unchanged; they are still part of the city's civil service so long as they continue to do their jobs. What appellees herein have attempted to do, and what the courts

below acquiesced in is the bootstrapping of an alleged violation regarding temporary employees into a vested right inuring to permanent employees in times of fiscal distress.

We reject the layoff priority scheme fashioned by the courts below. Sections 130 and 135 of the city charter do not establish, directly or indirectly, layoff priorities.[2] Therefore, unless and until the city chooses to amend its charter or otherwise legislate on the matter of layoff priorities, the power to lay off municipal employees in a financial emergency "must repose within the sound discretion of the mayor * * *." *Gannon II*, *supra*.

We now turn our attention to the second issue raised in this appeal. As previously noted, the trial court found that the proposed layoffs of 53 police officers jeopardized the city's health, safety, morals, and welfare. As a matter of law, we cannot accept the trial court's conclusions regarding the effect of the proposed layoffs on the city's health, safety, morals, and welfare. The proposed layoffs contemplated removal of one experienced officer and 52 rookies who had recently completed training at the Police Academy. Appellants plausibly assert that "[f]or a municipality in virtual bankruptcy, the layoff of 53 officers * * * from a police force of 1871 does not constitute the

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2. As we noted in *Gannon II*, *supra*, at page 313, the only section of the charter that mentions layoffs is Section 127, which states in pertinent part: "The civil service commission shall make * * * rules for the * * * lay-off * * * of city officials and employees in the classified service. * * *" Civil Service Commission Rule 8.20 deals with layoff priority and establishes the following procedure:

"Whenever it becomes necessary to reduce the working force in a classification in any division of the city service, the appointing authority may lay off any appointee in such classification; provided however, that where two or more persons are employed in a classification, they shall be laid off in the inverse order of their appointment in such classification, unless otherwise first approved by the commission for good cause shown * * *."

gross abuse of discretion which would warrant the trial court's stripping the Mayor of his vested authority." We agree with appellants that the contemplated layoffs, which were predicated on the city's exigent financial circumstances, did not constitute a gross abuse of discretion. Unquestionably, the layoffs would have had an adverse effect on the police department's ability to serve the public. Nevertheless, the record does not support the conclusion that the negative impact of this relatively modest number of layoffs would have been so severe as to result in the "functional paralysis" of the police department envisaged by the trial court.

The trial court's finding on the safety issue and the Court of Appeals' summary affirmance thereof is an expedient to avoid this court's holding in *Gannon* II, at page 313, that "the Charter of the city of Cleveland does not confer upon its safety forces a preferred priority over other civil service employees in the event layoffs are necessitated by reasons of economy." The rule of *Gannon* II is susceptible of evasion if trial courts routinely find that laying off safety personnel jeopardizes a community's health, safety, morals, and welfare.

For the reasons hereinbefore stated, the judgment of the Court of Appeals is reversed.

Judgment reversed.

W. BROWN, *Acting C. J.*, KEEFE, SWEENEY LOCHER, HOLMES, C. BROWN and KRUPANSKY, *JJ.*, concur.

KEEFE, *J.*, of the First Appellate District, sitting for CELEBREZZE, *C. J.*

DECISION AND OPINION OF THE OHIO COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT

(Dated May 14, 1981)

No. 43378 & 43416

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

WILLIAM J. McNEA, *et al.*,
Appellees,

vs.

GEORGE VOINOVICH, *et al.*,
Appellants,

and

JEFFREY COMFORT AND GARY J. NIED,
New Party Defendants-Appellants.

Date May 14, 1981

JOURNAL ENTRY AND OPINION

COOK, *P.J.*:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This is an appeal from a judgment of the Cuyahoga County Common Pleas Court permanently enjoining the City of Cleveland from laying off regularly appointed police officers while temporary appointees remained on the payroll in excess of ninety days.

On December 3, 1980, in an effort to balance general fund expenditures with general fund revenues in 1981, the City of Cleveland issued layoff notices to one hundred and eighty-four (184) general fund employees, effective January 1, 1981. Ninety-four (94) of the employees to be laid off were regular appointees in the Civil Service of the City of Cleveland while ninety (90) of the employees to be laid off were temporary employees in the Civil Service of the City.

On December 3, 1980, appellees, William J. McNea et al., filed an action in behalf of fifty-three police officers for a declaratory judgment and injunctive relief seeking to prohibit the layoff of the fifty-three (53) police officers while the City, appellant herein, maintained hundreds of temporary appointees in employment beyond ninety (90) days from their initial date of their hiring. Appellants' action also sought to enjoin the layoffs of the police officers on the ground such layoffs were excessive and jeopardized the health, safety, and welfare of the citizens of the City of Cleveland. A second amended complaint was filed by appellees after new party defendants were added as class representatives of the temporary appointees on the City's payroll.

On December 31, 1980, the trial court granted a preliminary injunction which was appealed to this court. The appeal was dismissed. After an application for a Writ of Mandamus was filed in this court, the parties agreed to proceed to trial as to appellees' prayer for a permanent injunction.

On January 9, 1981, a Third Amended Complaint was filed by appellees joining the members of the Cleveland Civil Service Commission as party defendants.

On January 15, 1981, the trial court issued a permanent injunction enjoining the City from laying off regularly appointed police officers while temporary appointees remained on the payroll in excess of ninety (90) days. The trial court also held that the layoff of the fifty-three (53) police officers would jeopardize the health, safety, morals, and welfare of the citizens of the City of Cleveland.

The City of Cleveland has appealed the judgment to this court and filed the following five assignments of error:

1. The trial court erred in refusing to dismiss the within action for lack of jurisdiction.

2. The trial court erred in concluding that there is any legal relationship between the layoff of patrol officers for lack of funds and the status of temporary appointees in the classified civil service of the City.

3. The trial court erred in concluding that temporary appointees in the classified civil service of the City who have occupied positions in excess of ninety days and receive compensation from the general fund do so in contravention of Sections 130 and 135 of the Cleveland Charter.

4. The trial court erred in refusing to recognize the renewal of temporary appointments effective December 29, 1980.

5. The trial court erred in enjoining the layoff of fifty-three patrol officers for lack of funds, in the absence of evidence in the record that such layoffs constituted a gross abuse of executive discretion.

Appellants, new party defendants Jeffrey Comfort and Gary J. Neid, also have appealed the judgment and have filed the following three assignments of error:

1. The Court of Common Pleas erred in its determination that some 681 persons holding temporary appointments to positions in the classified service of the City of Cleveland, who have held their present positions for more than ninety days, but have been denied their right to be tested therefore by the Cleveland Civil Service Commission, occupy their offices or positions and are compensated for their work in contravention of the Charter of the City of Cleveland.

2. The Court of Common Pleas erred in its determination that the appointing officers of the City of Cleveland are precluded from effecting the reappointment of persons temporarily to positions within the classified service of the City of Cleveland.

3. The Court of Common Pleas erred in construing liberally the provisions of Section 90 of the Charter of the City of Cleveland in favor of Plaintiffs, and in holding thereby that Plaintiffs were not required to request that the Director of Law of the City of Cleveland commence this action, prior to the institution of the action by the claimed taxpayers.

The assigned errors are without merit.

All appellants contend appellees failed to establish jurisdiction for their action by failing to make a written request of the Director of Law to institute such an action and failed to present evidence that such request would be a vain act.

Section 90 of the Charter of the City of Cleveland, as to an action to enforce a public right to the performance of a public duty by an officer of a municipal corporation, provides:

> "In case the Director of Law, upon written request of any taxpayer of the City, fails to make any application provided for in the preceding three sections, such taxpayer may institute suit or proceedings for such purpose in his own name on behalf of the City. No such suit or proceeding shall be entertained by any court until such request to the Director of Law shall first have been made . . ."

However, the Ohio Supreme Court has held that the prerequisite of written request upon a Law Director is excused where such a request would be a vain, useless, or futile act. Whether such futility exists depends upon the facts surrounding the taxpayer's litigation and the actions or inactions, motives, intent, and statements of the Law Director. *State ex rel. White v. Cleveland* (1973), 34 Ohio St. 2d 37.

The evidence presented by appellees clearly indicates it would have been a vain, useless, and futile act for appellees to have served a written request upon the Law Director of the City of Cleveland prior to filing their taxpayer's action. The Law Director had knowledge of the large number of temporary employees on the City's payroll in excess of ninety (90) days for six months prior to the institution of the action and took no action as to said employees despite having his staff research the legality of their continued employment. Failure to act as to said employees indicates the administration of the City felt their employment was lawful. The Law Director actively participated in the administration's determination to layoff

the fifty-three (53) police officers. The Law Director was also quoted in the Cleveland media as prepared to meet any challenges to the administration's layoff order.

Appellants next contend, in City of Cleveland's assignments of error two, three, and five and in new party defendants' first assignment of error that the trial court erred in finding that there was any legal relationship between the status of temporary appointees of the City of Cleveland over ninety (90) days and the right of the City to layoff City employees and the court erred, in the absence of an abuse of discretion by the Mayor in effecting the layoff program, in enjoining that layoff program.

These contentions of appellants were before this court in *Gannon v. Perk* (1976), 47 Ohio App. 2d 125. In *Gannon*, this court found that the requirements of Article XVIII, Sections 6 and 13 and R.C. 5705.39 and R.C. 5705.40 which require municipal corporations to maintain balanced budgets authorized the Mayor to layoff civil service employees for lack of funds as long as he did so in conformity with law. However, this court found that Section 130 and 135 of the Charter of the City of Cleveland prohibited the City from retaining temporary employees in excess of ninety days unless they became regular appointments by competitive examination and certification and prohibited any payments to them by the City Treasurer.

Although the Ohio Supreme Court dismissed the action for failure to join all temporary employees deprived the trial court of jurisdiction, it did not address this court's construction of Sections 130 and 135 of the Charter.

We reaffirm this court's construction of Sections 130 and 135 of the Cleveland Charter. Accordingly, we conclude the Mayor did not exercise his authority to effect layoffs of Civil Service employees for budgetary reasons

in conformance with the applicable law. Failure to do so constituted an abuse of discretion by the Mayor.

Appellants, in new party defendants' second assignment of error and City of Cleveland's fourth assignment of error, argue that the trial court erred in determining that the appointing officers of the City of Cleveland are precluded from affecting the reappointment of persons temporarily to positions within the classified service of the City of Cleveland.

In letters to the Civil Service Commission dated December 26, 1980, the various department heads of the City of Cleveland purportedly reappointed the temporary employees within their particular departments for an additional ninety days. The Civil Service Commission approved such reappointments at its regularly scheduled meeting of January 5, 1981.

However, the evidence indicates the letters from the various department heads were drafted and issued approximately three weeks after the instant litigation was filed. The evidence also indicates the Mayor did not personally sign any of the reappointment letters although his signature appears as the appointing authority on all the letters. The evidence as to the reappointment letters indicates it was an effort to moot the pending law suit.

We also conclude the purpose of Section 130 is to preserve the merit principle in civil service appointments by prohibiting any temporary employee from holding in excess of ninety days without altering his employment status by competitive examinations.

Therefore, the trial court did not err in declaring the action of reappointing temporary employees illegal and of no effect.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ ROBERT E. COOK
Judge
Presiding Judge

STILLMAN, *J.*,
SILBERT, *J.*, concur.

(STILLMAN, *J.*, and SILBERT, *J.*,
Retired of the Eighth Appellate
District, Sitting by Assignment;
COOK, *P.J.*, of the Eleventh
Appellate District, Sitting by
Assignment)

DECISION AND JUDGMENT OF THE OHIO COURT OF COMMON PLEAS

(Dated January 15, 1981)

Case No. 20649

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

WILLIAM J. McNEA, *et al.*,
Plaintiffs,

vs.

GEORGE VOINOVICH, *et al.*,
Defendants.

JUDGMENT ENTRY

This matter came on for hearing this 9th day of January, 1981, upon the merits of the plaintiffs' prayer for permanent injunctive relief by reason of an understanding with the Court of Appeals following the institution of a mandamus proceeding by the defendants in that Court, and upon the pleadings, the evidence, and proceedings had herein, all parties being represented by Counsel.

All other aspects of the within cause will be disposed of at a later date.

The Court finds as follows:

A. That the within cause has proceeded as a class action under Rule 23(B)(3) Ohio Rules of Civil Procedure against the defendant class consisting of all em-

ployees of the City of Cleveland occupying a position within the classified civil service of the City who have never been tested nor certified by the Civil Service Commission of the City for said position but continue to receive a salary as compensation on account of holding said position and have been employed in said position in excess of ninety (90) days.

B. That new party defendants Jeffrey Comfort and Gary J. Neid were designated as the class representatives of the defendant class and have fairly and adequately protected and represented the interests of the class.

C. That the plaintiffs on December 22, 1980, at approximately 4:00 P.M. caused to be delivered to the City of Cleveland Mail Room 1243 envelopes addressed to each City of Cleveland temporary appointee at his or her assigned City Department. Each envelope contained a two page "Notice of Pendency of Class Action" in the form and style attached hereto as Exhibit A.

D. That the list of names and department addresses of temporary appointees utilized by the plaintiffs was provided by the defendant City of Cleveland.

E. That such notification complies with this Court's class notice requirement as set out in its Journal Entry of December 19, 1980, and this Court is satisfied that the defendant class has received notice and has had ample opportunity to appear in these procedings and upon plaintiffs' Motion for Preliminary Injunction, and upon the merits of plaintiffs' prayer for permanent injunctive relief.

F. That the defendant class has retained Malcolm C. Douglas, Esq. as legal counsel who has appeared before the Court in these proceedings on behalf of the defendant class.

G.(1) That presently the City of Cleveland employs approximately 681 temporary employees who without having taken a Civil Service Commission examination or being certified by the Civil Service Commission of the City occupy positions within the classified civil service of the City and who are paid strictly from the General Fund, and not from any special, limited, governmental or self-generating fund.

(2) That these 681 temporary employees have occupied classified civil service positions with the City for a period in excess of 90 days in direct contravention of the City of Cleveland Charter Section 130 and continue to receive payment, salary and/or compensation by virtue of their holding said positions in direct contravention of the City of Cleveland Charter Section 135, and Article XV, Section 10, of the Ohio Constitution.

(3) That these 681 temporary employees continue to occupy their positions within the classified civil service of the City and receive payment, salary and/or compensation, both contrary to law.

H. That 53 Cleveland police officers who are regular certified employees, 52 of whom graduated from the Cleveland Police Academy on December 19, 1980, were scheduled to be laid off due to budgetary considerations on January 1, 1981. These police officers took Civil Service examinations and were certified for the positions that they currently hold.

I. That on December 31, 1980, this Court granted the plaintiffs' Motion for a Preliminary Injunction enjoining the defendants from effecting the layoff of such 53 police officers all certified, regular Civil Service employees.

The Court further finds:

J. (1) That the defendant, City of Cleveland attempted, during the pendency of the within cause, to reappoint in bulk all of its temporary employees. Such actions were conceived by and effected by various members of defendant Voinovich's staff.

(2) That the testimony of defendant Voinovich in the within cause reflected the fact that he neither conceived of nor attempted to effect the reappointment of the temporary employees. The evidence established the fact that defendant Voinovich personally signed none of the documents relating to this attempted reappointment.

(3) The evidence reflects that the Mayor of Cleveland, defendant Voinovich, was not apprised of this attempted subterfuge.

(4) That the attempted evasion by the City of Cleveland of its own Charter provisions through the devious device of reappointing in bulk of all of its temporary employees and thus frustrate the thrust of this litigation was stated on December 31st to be a transparent ploy and a subterfuge not worthy of judicial recognition.

(5) That this Court did not on December 31, 1980, recognize the efficacy of the attempted reappointment of the temporary employees, nor the contended infusion of legal validity to their status. This Court does not at this time recognize such efficacy or validity.

K.(1) That the evidence presented in this proceeding strongly suggests that by reason of lack of manpower the Cleveland Police Department is on the brink of functional paralysis.

(2) That the evidence overwhelmingly establishes the present inability of the Cleveland Police Department to ful-

fill the responsibilities with which it is charged and which it once so admirably performed and that the proposed layoffs of police personnel would jeopardize the health, safety, morals and welfare of the City, the residents and taxpayers thereof.

L. That this Court does not presume to instruct the City of Cleveland with respect to the means by which, or the areas within which the required economies are to be effected.

M. That having met their burden in this proceeding, the plaintiffs' prayer for permanent injunction is granted.

N. That there being no just reason for delay, final judgment with respect to the injunctive relief sought is hereby granted pursuant to Rule 54.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. The defendants, their officers, agents and employees are hereby permanently enjoined and restricted from effecting the layoff of any Cleveland Police Officer so long as the defendant City of Cleveland retains and maintains on the City payroll, temporary employees regardless of their Civil Service classification, status, or rank of employment.

2. That Bond in the amount of $10,000.00 previously ordered posted by the plaintiffs is hereby discharged.

IT IS SO ORDERED.

/s/ JAMES J. CARROLL
Judge

ORDER AND JUDGMENT ENTRY OF THE OHIO SUPREME COURT DENYING REHEARING

(Dated June 23, 1982)

No. 81-1108

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

WILLIAM J. McNEA *et al.*,
Appellees,

vs.

GEORGE VOINOVICH *et al.*,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

THE CHARTER OF THE CITY OF CLEVELAND

§ 130 Eligible Lists; Temporary Appointments.

Eligible lists created by the Commission shall remain in force not longer than two years. In the absence of an appropriate eligible list, any place may be filled temporarily, without test, for the period limited by the civil service rules, but not exceeding ninety days. During such period the Commission shall hold the necessary tests for filling any such place permanently. With the consent of the Commission, persons may be temporarily employed for transitory work without test, but no such employment shall continue for more than sixty days, or be renewed. (Effective November 9, 1931.)

§ 131 Appointments.

When any position in the classified service, except the ordinary unskilled labor class, is to be filled, the appointing authority shall notify the Commission of the fact and the Commission shall certify to such authority the names and addresses of the three candidates standing highest on the eligible list for the class or grade to which such position belongs. The appointing authority shall appoint to such position one of the three persons whose names are so certified. When the eligible list contains less than three names, such names shall be certified, from which the appointing authority may appoint one for such position, except that when the position is promotional the appointing authority shall appoint one for such position. A person certified from the eligible list more than three times to the same or similar position may be omitted from future certification, but certification for a temporary appointment shall not be counted as one of such certifications.

* * * * *

§ 133 Promotions Wherever Practicable.

Wherever practicable, vacancies shall be filled by promotion. Any advancement in rank or increase in salary beyond the limits fixed for the grade shall constitute a promotion. Lists shall be created and promotions made therefrom of candidates in the same manner as in original appointments; provided, however, that less than three shall constitute an eligible list, and the appointing authority shall appoint from the eligible list. (Effective November 8, 1938.)

§ 135 List of Persons in Classified Service.

The Civil Service Commission shall maintain a list of all persons in the classified service, showing in connection with each name the position held, the date and character of each appointment and every subsequent change in status. Each appointing officer shall promptly transmit to the Commission all information required for the establishment and maintenance of such list. The Treasurer shall not pay, nor shall the Commissioner of Accounts issue a voucher for the payment of, any salary or compensation to any person holding a position in the classified service unless the payroll or account of such salary or compensation shall bear the certificate of the Civil Service Commission that the persons named therein have been appointed or employed and are performing service in accordance with the civil service provisions of this Charter and the rules established thereunder. Any sums paid contrary to the provisions of this section may be recovered from any officer paying or authorizing the payment thereof and from the surety on his official bond. (Effective November 9, 1931.)

CLEVELAND CIVIL SERVICE COMMISSION RULES

6.20. Certification of Eligibles. No person shall be considered from an eligible list more than four (4) times by the same appointing authority, for a position of the same or similar classification, except at the request of the appointing authority, provided, however, that no such person shall be certified when to do so operates to prejudice the rights of other eligibles ranking higher on the eligible list.

An eligible whose job classification is city wide shall be certified to other appointing authorities for consideration.

Certification for temporary appointment shall not be counted as one of the four certifications allowed to each eligible.

Whenever one or more eligibles who have been certified waive certification or fail to respond to notice of certification, the certification on which their names appear shall be supplemented by an equal number of additional names. No request for certification of eligibles or additional names to supplement existing certifications shall be honored by the commission after the expiration of such eligible list.

6.30. Notice of Certification. Each eligible, whose name is included in a certification of eligibles, shall be notified in writing by the commission to report "to the appointing authority or his designated officer," within four (4) days for interview. Such notice shall be sent by mail to the last address of the eligible as shown by the records of the commission. Any eligible may waive certification either before being certified or within four

(4) days after being certified except that an eligible may not waive certification more than two (2) times, and the reason for such waiver of certification must be approved by the commission. A waiver of certification shall remain in effect until withdrawn but no waiver shall be permitted for a period longer than six (6) months after which time, if the waiver is not withdrawn, the name of such person shall be removed from the eligible list. An eligible shall not be entitled to certification while his waiver of certification is in effect. The appointing officer shall make immediate report to the commission whether each of the persons certified appeared for an interview and whether any of them declined or waived appointment.

6.40. Request Signed by Appointing Officer. No request for certification of eligibles and no notice of appointment whether of a permanent or temporary appointment, shall be recognized by the commission unless made by and over the signature of the lawful appointing authority.

6.50. Character of Appointments. In accordance with Sections 128, 131 and 133 of the Charter, all appointments to positions in the classified service of the City of Cleveland shall be deemed to be either regular or temporary in character.

Regular appointments shall be either original or promotional. An original appointment shall be any appointment made from an eligible list created as a result of an open competitive or non-competitive test or as a result of an examination for a labor class position. An appointment shall be deemed to be promotional when made from any promotional eligible list and involving an advancement in rank or an increase in salary, or both.

Temporary appointments shall include appointments made, without test, in the absence of an eligible list, ap-

pointments occasioned by emergencies and limited to thirty days duration and appointments for transitory work not exceeding sixty (60) days and not renewable.

6.60. Regular Appointments. Regular appointments shall be made in the manner provided in Sections 131 and 133 of the Charter; however, an appointment made as a result of certification from a list designated by the commission as the most nearly appropriate list shall be deemed to be a regular appointment to the position for which such certification is made.

All regular appointments shall be accomplished within ten (10) days following the date on which certification is executed by the commission; such period may be extended by the commission for good cause shown. However, when it is necessary to supplement a certification by adding names, to replace eligibles who have failed to respond to notice of certification, who have waived certification, or who have declined appointment, another ten (10) day period may be granted to the appointing authority for him to have under consideration the required number of eligibles interested in securing appointment as provided in Sections 131 and 133 of the Charter.

Failure to make appointments as provided herein, shall have the effect of automatically cancelling the certification, and shall be sufficient cause for disapproving the names of any temporary appointees employed in the classification and in the division for which such certification was made.

6.70. Temporary Appointments. In all temporary appointments and notices to the commission thereof, each appointing authority shall carefully designate which of the three following classes of temporary appointments is being made and the nature of the work to be performed thereunder:

A. Pending Establishment of Eligible List:

In the absence of an appropriate eligible list, any place in the classified service may be filled temporarily, without test, but no such temporary appointment shall continue after the establishment of a suitable eligible list; provided, however, that the commission reserves the right to review the qualifications of any such temporary appointee and order the rejection of such temporary appointee if he is found lacking in qualifications.

B. Transitory:

With the consent of the commission, persons may be temporarily employed for transitory work whenever an appointing authority requires temporary assistance because of a special project or temporary increase in the work load, due to seasonal requirements or otherwise. In making such transitory appointments, the appointing authority shall first employ persons, in the appropriate classification based on seniority, who are then on lay-off in that classification, or, if no lay-off list exists, then from an appropriate existing eligible list for such classification, before employing a person not on lay-off or an existing eligible list, but no such employment shall continue for more than sixty (60) days or be renewed.

C. Emergency:

When an emergency arises, such that in order to prevent the loss of public property, serious inconvenience to the public, or damaging delay to the public service, and one or more persons must be employed without the delay incident to regular certification and appointment, an appointing authority

may, without consulting the commission, appoint a qualified person or persons during the period of emergency, but in no such case for a period exceeding thirty (30) days. Emergency appointments, with the reasons therefor, shall be immediately reported to the commission which reserves the right to inquire into the nature of the emergency and to reject such appointment if it is found not to be an emergency, and in no case shall successive appointments follow directly upon one another without the express approval of the commission.

6.75. The Temporary Appointee. The temporary appointee has those rights and privileges of a regular appointee which are in conformity with the provisions of the City Charter and the Rules of the Civil Service Commission subject to the exceptions listed below:

The Temporary Appointee:

1. Must have the previously established minimum qualifications required for the specific classification.
2. Receives no seniority credit which only commences from the effective date of regular appointment.
3. Is not eligible to transfer to another position.
4. Is not eligible to take promotional examinations.
5. Does not serve a probationary period.
6. Has no restorative rights to an eligible list should he resign.
7. Is not placed on an eligible list during lay-off.

The temporary employee is subject to the same disciplinary action as the regular appointee.

OHIO RULES OF APPELLATE PROCEDURE

Rule 9

THE RECORD ON APPEAL

(A) Composition of the record on appeal. The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App.R. 9(B), shall constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented and append such copy of the portions of the transcripts to their briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means.

(B) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered. At the time of filing the notice of appeal the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record and shall file a copy of said

order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonogramic or photographic means, or by the use of audio electronic recording devices, or by the use of video recording systems. If there be no officially appointed reporter, Rule 9(C) or 9(D) may be utilized. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, he shall include in the record a transcript of all evidence relevant to such findings or conclusion. Unless the entire transcript is to be included, or if no transcript is necessary, or if a statement pursuant to either Rule 9(C) or 9(D) is to be prepared in lieu of a transcript, the appellant shall, with his notice of appeal, file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript which he intends to include in the record or a statement that no transcript is necessary or that a statement pursuant to either Rule 9(C) or 9(D) will be submitted, and a statement of the assignments of error he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within ten days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

If the appellant shall refuse, or fail within ten days after service upon him of appellee's designation, to order such parts, the appellee within five days thereafter, shall either order the part in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so. At the time of ordering, a party shall arrange for the payment to the reporter of the cost of the transcript.

The reporter shall certify the transcript as correct whether in written or videotape form and state whether it is a complete or partial transcript, and, if partial, indicate the parts included and the parts excluded.

If the proceedings were recorded in part by videotape and in part by other media, the appellant shall order the respective parts from the proper reporter and the record is complete for the purposes of appeal when the last such part is filed with the clerk of the trial court.

OHIO REVISED CODE

2505.21 Hearing on appeal

Appeals taken on questions of law shall be heard upon assignments of error filed in the cause or set out in the briefs of the appellant before hearing. Errors not specifically pointed out in the record and separately argued by brief may be disregarded, but the court may consider and decide errors which are not assigned or specified. Failure to file such briefs and assignments of error within the time prescribed by the court rules is cause for dismissal of such appeal. All errors assigned and briefed shall be passed upon by the court. In its decision the reviewing court shall specify such of the assigned errors as it finds are shown by the record and the reasons for its decision. In every case where a judgment or order is reversed and remanded for a new trial or hearing, in its mandate to the court below, the reviewing court shall state the errors found in the record upon which the judgment of reversal is founded.

An appeal taken on questions of law and fact entitles the party to a hearing and determination of the facts de novo which shall be upon the same or amended pleadings. The court shall review the final order, judgment or decree upon such part of the record made in the trial court as any party may present to the court and such additional evidence as upon application in the interest of justice the court may authorize to be taken, such evidence to be presented in the manner and form prescribed by the court.

PETITIONERS' THIRD AMENDED COMPLAINT SEEKING DECLARATORY RELIEF, TEMPORARY RESTRAINING ORDER, AND PRELIMINARY AND PERMANENT INJUNCTION

(Filed January 6, 1981)

Case No. 20649

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

WILLIAM J. McNEA, Taxpayer and as President of the Cleveland Police Patrolmens Association,

and

PAUL JURCISIN, Taxpayer,

and

CLEVELAND POLICE PATROLMENS' ASSOCIATION, As and on behalf of its members,
Plaintiffs.

v.

GEORGE VOINOVICH, Mayor, City of Cleveland, THOMAS WAGNER, Law Director, City of Cleveland, JACK CROSS, Treasurer, City of Cleveland, WILLARD LARGENT, Safety Director, City of Cleveland, CITY OF CLEVELAND, VINCENT AMATO, Acting Safety Director, City of Cleveland,

and

JAMES CONRAD, Personnel Director, City of Cleveland, WILLIAM J. BROWN, Attorney General, State of Ohio,
Defendants,

and

JEFFREY COMFORT, GARY J. REID, and JOHN GIEB,
New Party Defendants,

and

ALAN SCHNEIDER, Commissioner of Accounts, City of Cleveland,

and

CLEVELAND CIVIL SERVICE COMMISSION,

and

THOMAS R. SKULINA, President Civil Service Commissioner,

and

MARY R. BUBNA, Vice President Civil Service Commission,

and

EDWARD H. MASON, Secretary Civil Service Commission,

and

P. L. FENDERSON, Civil Service Commission,

and

EDMUND J. TURK, Civil Service Commission,
Additional New Party Defendants.

THIRD AMENDED COMPLAINT SEEKING DECLARATORY RELIEF, TEMPORARY RESTRAINING ORDER, AND PRELIMINARY AND PERMANENT INJUNCTION

PARTIES

1. Plaintiffs are residents and taxpayers of the City of Cleveland. Plaintiffs McNea and Jurcisin are officers and members of the Cleveland Police Patrolmen's Association (hereinafter C.P.P.A.) and are sworn classified employees of the City of Cleveland, Department of Public Safety, Division of Police, holding the rank of patrolman.

2. Plaintiff, the C.P.P.A., is recognized by the City of Cleveland as the sole exclusive collective bargaining agent on behalf of the bargaining unit made up of all of the Cleveland Police Department Patrol Officers for the purpose of bargaining with respect to wages, hours and other conditions of employment and brings this action on its behalf and on behalf of all of its members.

3. Defendant George Voinovich (hereinafter "Voinovich") is the Mayor of the City of Cleveland.

4. Defendant Thomas Wagner (hereinafter "Wagner") is the Law Director of the City of Cleveland.

5. Defendant Jack Cross (hereinafter "Cross") is the Treasurer of the City of Cleveland.

6. Defendant Willard Largent (hereinafter "Largent") is the Safety Director of the City of Cleveland.

7. Defendant Vincent Amato (hereinafter "Amato") is the Acting Safety Director of the City of Cleveland.

8. Defendant City of Cleveland (hereinafter "City") is a municipal corporation operating pursuant to Charter.

9. Defendant James Conrad (hereinafter "Conrad") is the Personnel Director of the City of Cleveland.

10. Defendant William J. Brown (hereinafter "Brown") is the Attorney General of the State of Ohio and is named herein as a party defendant pursuant to Ohio Revised Code Section 2721.12.

11. New Party defendant Jeffrey Comfort (hereinafter "Comfort") is Commissioner of the Department of Health of the City of Cleveland. New party defendant Gary N. Neid (hereinafter "Neid") is the Commissioner of the Department of Air Pollution Control of the City of Cleveland. New party defendant John Gieb (hereinafter

"Gieb") is the Deputy Commissioner of Airports of the City of Cleveland.

12. New party defendants Comfort, Neid and Gieb are employees of the City and occupy the aforementioned positions within the classified civil service of the City. Comfort, Neid and Gieb have not taken civil service examinations for their respective positions and, therefore, have never been certified by the Civil Service Commission of the City for their positions. Comfort, Neid and Gieb have each held their present positions for a period in excess of ninety (90) days and although they have never been tested nor certified continue to receive salary and compensation by virtue of their holding said positions.

13. Defendants Comfort, Neid and Gieb are joined herein as party defendants and class representatives of a class comprised of employees of the City of Cleveland who are similarly situated, to wit: all employees occupying a position within the classified civil service of the City of Cleveland, who have never been tested for said position and have never been certified by the Civil Service Commission of the City for said position but continue to receive a salary or compensation on account of holding said position even though he has been employed in said position for a period in excess of ninety (90) days.

14. Defendants Comfort, Neid and Gieb are joined as party defendants and class representatives on behalf of all members of the class designated above, for the reason that:

(a) The class is so numerous that joinder of all members is impracticable;

(b) there are questions of law or fact common to the class;

(c) the defenses of the representative parties are typical of the defenses of the class;

(d) the representative parties will fairly and adequately protect the interests of the class.

15. Additional new party defendant Alan Schneider is the Commissioner of Accounts for the City of Cleveland.

16. Additional new party defendant The Cleveland Civil Service Commission is charged pursuant to the Charter of the City of Cleveland with administering the City's Civil Service system and certifies the various employment and certification procedures of the City's employees. The Commission is comprised of and acts through its five members. The members pass resolutions both in private executive session and at open public meetings. Such actions are reflected in its Minutes.

17. Additional new party defendant Thomas R. Skulina is the duly appointed President and presently a member of the Cleveland Civil Service Commission.

18. Additional new party defendant Mary R. Bubna, is the duly appointed Vice President and presently a member of the Cleveland Civil Service Commission.

19. Additional new party defendant Edward H. Mason, is the duly appointed Secretary and presently a member of the Cleveland Civil Service Commission.

20. Additional new party defendant P.L. Fenderson is presently a member of the Cleveland Civil Service Commission.

21. Additional new party defendant Edmund J. Turk is presently a member of the Cleveland Civil Service Commission.

22. Plaintiffs bring this action in their respective capacities as residents and taxpayers of the City and as Officers of the C.P.P.A. and sworn classified employees of the City of Cleveland, Department of Public Safety,

Divison of Police, holding the rank of patrolman. On December 2, 1980, a demand to bring the within action was made upon Thomas Wagner, Law Director of the City of Cleveland (Exhibit A), by United States Mail. However, based upon the public statements of the defendants and their conduct on December 2, 1980, wherein they told Plaintiff McNea and other City Union leaders of layoffs scheduled for January 1, 1981, it is apparent that future demand by taxpayers is vain and futile.

COUNT I

23. On or about December 2, 1980, Voinovich publicly announced that approximately 53 Police Officers of the City of Cleveland who are regular appointees would be laid off, effective January 1, 1981, and that layoff notices would be forthcoming.

24. These layoff notices will advise that the actual layoffs will become effective and will be implemented on January 1, 1981.

25. The 53 Police Officers proposed for layoff are regular, qualified and duly appointed employees of the City occupying positions within the classified civil service of the City and assigned to the Cleveland Police Academy. These Police Officers took civil service examinations for the positions that they currently hold and were certified by the Civil Service Commission of the City for the positions they presently occupy.

26. Plaintiffs believe and, therefore, state that the defendants will be laying off additional regular classified appointed Police Officers in the near future.

27. Presently, the City employs more than Eleven Hundred (1100) temporary employees, who without having taken a Civil Service Commission examination or being

certified by the Civil Service Commission of the City, occupy positions within the classified civil service of the City. Those approximately 1100 temporary employees have occupied classified civil service positions of the City for a period in excess of 90 days in contravention of the City Charter Section 130 and continue to receive payment, salary and compensation by virtue of their holding said positions in contravention of City Charter Section 135.

28. City Charter Section 130 provides:

"Eligible lists created by the commission shall remain in force not longer than two years. In the absence of an appropriate eligible list, any place may be filled temporarily, without test, for the period limited by the civil service rules, but not exceeding ninety days. During such period the commission shall hold the necesary tests for filling any such place permanently. With the consent of the commission, persons may be temporarily employed for transitory work without test, but no such employment shall continue for more than sixty days, or be renewed."

29. City Charter Section 135 provides in pertinent part:

"The treasurer shall not pay, nor shall the commissioner of accounts issue a voucher for the payment of any salary or compensation to any person holding a position in the classified civil service unless the payroll or account of such salary or compensation shall bear the certificate of the civil service commission that the persons named therein have been appointed or employed and are performing service in accordance with the rules established thereunder. Any sums paid contrary to the provisions of this section may be recovered from any officer paying or authorizing the payment thereof and from the surety on his official bond."

30. The approximately 1100 temporary employees presently on the payroll of the City are employed and being paid in contravention of the Charter of the City.

31. No regular, qualified or duly appointed civil service employees of the City may be laid off until all temporary employees who have been on the City payroll in excess of 90 days have been laid off.

COUNT II

32. Plaintiffs reallege as if fully restated herein all allegations contained in the preceding paragraphs 1 through 31 hereof, inclusive, and further state:

33. City Charter Section 71 provides in pertinent part:

> "It shall be the duty of the mayor to act as chief conservator of the peace within the City . . ."

34. City Charter Section 115 provides:

> "The City shall maintain a police force and fire force, and the mayor shall be the executive head of both forces. If these forces are or shall be placed in a department in accordance with the provisions of Section 77 of this Charter the director of this department shall be their executive head under the direction of the mayor."

35. The layoff of approximately 53 Police Officers, the impending future layoffs, taken together with 102 Police Officers who retired during 1980 and the probable retirement of 213 Police Officers during 1981, will reduce the complement of the Cleveland Police Department to dangerously low proportions such that the manpower and the very strength of the Police Department essential services heretofore performed by the Police Department will

be curtailed all to the detriment of the residents and taxpayers of the City.

36. The layoff of approximately 53 Police Officers is excessive and will jeopardize the health, safety, morals and welfare of the City and the residents and taxpayers thereof.

37. Voinovich, Largent, Amato and other defendants in ordering and instituting the layoff of 53 Police Officers and the impending layoffs which will jeopardize the health, safety, morals and welfare of the residents and taxpayers of the City have grossly abused their discretion and Voinovich has specifically violated his aforesaid Charter responsibilities.

COUNT III

38. Plaintiffs reallege as if fully rewritten herein all of the allegations contained in the preceding paragraphs 1 through 37 inclusive, and further state that Article XV, Section 10 of the Ohio Constitution provides:

"XV §10 Civil Service

> Appointments and promotions in the civil service of the state, and several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

39. The impending layoffs of regular appointees to the Cleveland Police Department in advance of temporary appointees to the same job classification violates Article XV, Section 10 of the Ohio Constitution.

COUNT IV

40. Plaintiffs reallege as if fully rewritten herein all of the allegations contained in the preceding paragraphs 1 through 39 inclusive, and further state that the defendant City of Cleveland and its named defendant officials have attempted and will continue to attempt during the pendency of this litigation, to cause the defendant Civil Service Commission by and through the defendant Civil Service Commission members, to reappoint or otherwise terminate and immediately rehire as new temporary employees through the guise of official City and Civil Service actions, all members of the defendant class thereby defeating the claims of the plaintiffs and the taxpayers they represent. That between December 17 and December 29, 1980, defendant City of Cleveland and its named defendant officials caused each City Department Head to forward letters to the Cleveland Civil Service Commission ostensibly for the purpose of reappointing all members of the defendant class which members worked within the respective departments. That at the January 5, 1981, meeting of the Civil Service Commission such Commission accepted such reappointments en masse and thereby lent its official approval to such reappointment of each member of the defendant class.

41. That such attempted reappointments of all the members of the defendant class is an attempt to circumvent the clear requirements of the City Charter and constitutes a flagrant abuse of authority and discretion by the defendant City of Cleveland, its named defendant officials, the Cleveland Civil Service Commission, and its named defendant members for which plaintiffs have no adequate remedy at law.

42. That this Court should declare that such actions taken by the respective defendants to defeat the provisions

of the City Charter are illegal, null and of no effect, and thereby permanently enjoin such reappointments.

WHEREFORE, plaintiffs demand:

1. That defendants be enjoined from laying off any Cleveland Police Officers until all temporary employees of the City of Cleveland who have occupied classified civil service positions for a period in excess of 90 days without having taken a civil service examination and having been certified for the position are laid off.

2. That defendants be enjoined from laying off any Cleveland Police Officers as the same will jeopardize the safety, health, morals and welfare of the residents and taxpayers of the City of Cleveland.

3. That defendants be enjoined from paying or issuing vouchers for the payment of any salary or compensation or emolument of any fund to any person holding a position in the classified civil service contrary to the Charter of the City of Cleveland, and particularly all temporary employees on the payroll of the City for a period in excess of 90 days without having passed a civil service examination notwithstanding any attempted reappointment by the City of Cleveland.

4. That defendants Voinovich, Wagner, Cross, Largent, Amato, Conrad and Schneider be ordered personally to reimburse the City of Cleveland all funds paid to the temporary employees of the City who have been on the City payroll in excess of 90 days without first having passed a civil service examination.

5. That the actions of the defendant City of Cleveland and its named defendant officials and those of the Cleveland Civil Service Commission in attempting to reappoint all members of the defendant class be declared illegal, void and of no effect.

6. That the defendant City of Cleveland and its named defendant officials, and the defendant Civil Service Commission and its members be permanently enjoined from reappointing for like 90 days periods of employment the members of the defendant class.

7. That costs of this proceeding be assessed against the defendants and that the plaintiffs, as taxpayers, be awarded a reasonable sum as and for attorneys fees and that the same be taxed as part of the costs.

8. For such other and further relief as the Court deems appropriate.

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EXCERPT FROM CITY RESPONDENTS' BRIEF ON THE MERITS TO THE OHIO SUPREME COURT

Case No. 81-1108

IN THE SUPREME COURT OF OHIO

WILLIAM J. McNEA, *et al.*,
Plaintiffs-Appellees,

vs.

GEORGE VOINOVICH, *et al.*,
Defendants-Appellants,

and

JEFFREY COMFORT and GARY J. NIED,
New Party Defendants-Appellants.

DEFENDANTS-APPELLANTS' BRIEF

• • • • •

ARGUMENT

At the trial of the instant action, plaintiffs failed to adduce any evidence in support of Count III of their complaint—that patrol officers were to have been laid off "in advance of temporary appointees in the same job classification." Since Rule 8.20 of the Civil Service Commission requires appointing authorities to lay off employees in any classification in inverse order of their appointments to that classification, the allegations of Count III, if proven, would have been a valid ground for enjoining the proposed patrol officer layoffs. However, neither the trial court nor the Court of Appeals rested their decisions on this ground.

With respect to the second count of plaintiffs' complaint—that the layoff of 53 of some 1,850 patrol officers was so excessive as to constitute an abuse of discretion on the part of the Mayor, the trial court made a finding in plaintiffs' favor. On appeal to the Court of Appeals, the City of Cleveland assigned this finding as error, on the ground that plaintiffs had failed to sustain the heavy burden of proof required to invalidate the discretionary acts of executive officers. The Court of Appeals failed to address this burden-of-proof question in its Journal Entry and Opinion. Nevertheless, since such a determination must be made on a case-by-case basis, and since the proposed layoffs of police officers at issue in the courts below were supsequently rescinded, the *City of Cleveland will forego raising this issue in this appeal.* (Emphasis added.)

The purpose of this appeal then, is to determine whether the courts below were correct in granting plaintiffs relief under the first count of their complaint. In that count, plaintiffs alleged at paragraph 24 of their complaint that "(n)o regular, qualified or duly appointed civil service employee of the City may be laid off until all temporary employees who have been on the City payroll in excess of 90 days have been *laid off.*" (Emphasis added.) Thus, plaintiffs sought to have the court establish a city-wide "regulars over temporaries" layoff priority. Such a result would divorce layoffs from their financial underpinnings: lack of divisional appropriations for personal services sufficient to compensate the existing divisional work force. (Emphasis added.)

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OCT 20 1982
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CLERK

No. 82-463

In the Supreme Court of the United States

October Term, 1982

WILLIAM J. McNEA *et al.*,
Petitioners,

vs.

GEORGE VOINOVICH, MAYOR, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ohio Supreme Court's decision, on a complete record following argument, that, as a matter of Ohio law, Cleveland's mayor did not grossly abuse his discretion by proposing to lay off fewer than three percent of Cleveland's police officers as a budget-balancing measure, denied petitioner police officers due process of law under the Fourteenth Amendment?

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No. 82-463

In the Supreme Court of the United States

October Term, 1982

WILLIAM J. McNEA *et al.*,
Petitioners,

vs.

GEORGE VOINOVICH, MAYOR, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Anticipating an $8.4 million deficit for fiscal year 1981 and required by law to maintain a balanced budget,[1] the Mayor of the City of Cleveland ("Cleveland"),[2] in late 1980, proposed a plan to lay off 184 City employees, including 53 police officers, to balance the budget. Fifty-two of the police officers were rookies who graduated from the Cleveland Police Academy in mid-December of 1980. At that time there were 1871 Cleveland policemen.

---

1. *See* Ohio Revised Code Section 5705.39, Appendix at A4.

2. The City of Cleveland, its Mayor, George V. Voinovich, and numerous other City officials were sued and appear before this Court as Respondents. They are collectively referred to as "Cleveland." Separate Respondents Comfort and Nied represent a class of temporarily appointed City employees under Cleveland's Civil Service law, whom petitioners sought to have declared "illegal" employees. They are referred to herein as "new-party defendants."

Petitioners[3] filed this action in the trial court seeking to enjoin the proposed layoffs of the police officers on several grounds. The trial court ruled in favor of the union and granted the injunction. By its unanimous opinion and order of May 26, 1982, and its order of June 23, 1982, denying petitioners' motion for rehearing on the identical claim asserted in this Court,[4] the Supreme Court of Ohio reversed the judgment of the Court of Appeals and ruled in favor of Cleveland and the new-party defendants on all of petitioners' claims.

The petition for writ of certiorari arises from petitioners' claim that the proposed layoff of 53 of 1871 police officers was a gross abuse of discretion by the Mayor which jeopardized the health, safety, and welfare of the City.[5]

Cleveland and new-party defendants appealed to the Court of Appeals of Ohio, Eighth Appellate Judicial District.

Pursuant to Rule 9 of the Ohio Rules of Appellate Procedure[6] and Rule 4 of the Local Rules of the Eighth Appellate Judicial District of Ohio,[7] Cleveland and the new-party defendants both filed praecipes ordering the entire transcript to be included in the record on appeal. These praecipes stated that the record on appeal consisted of:

---

3. Petitioners are William J. McNea and Paul Jurcisin, police officers and officers of the Cleveland Police Patrolmen's Association, and the union itself.

4. *See* Petition at 5.

5. Petitioners do not seek review of the Supreme Court of Ohio's construction of the Charter of the City of Cleveland.

6. Appendix at A5-A8.

7. Appendix at A9-A12.

1. Original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries.

In addition the record will include:

2. Complete transcript under Rule 9(B).[8]

Pursuant to Rule 16 of the Ohio Rules of Appellate Procedure,[9] Cleveland filed its assignments of error, which included:

> 5. The trial court erred in enjoining the layoff of fifty-three patrol officers for lack of funds, in the absence of evidence in the record that such layoffs constituted a gross abuse of executive discretion.

This issue was fully briefed and argued in the Court of Appeals, which by order of May 14, 1981, affirmed the trial court in all respects.

Cleveland and the new-party defendants appealed to the Supreme Court of Ohio. The Supreme Court of Ohio took jurisdiction of the case by granting appellants' *motions that the record of the case be certified from the Court of Appeals to the Supreme Court.*[10] In accordance with Section 10 of Rule II of the Ohio Supreme Court's Rules of Practice,[11] the Court of Appeals transmitted the *complete record of the case*, including the complete transcript and all the papers in the case, to the Clerk of the Ohio Supreme Court. Also, as required by Section 1(E) of Rule V

---

8. Cleveland's praecipe is reproduced in the Appendix at A2-A4. New-party defendants' praecipe was identical in all relevant respects.

9. Appendix at A13.

10. Appendix at A1. *See* O. Const., Article IV, Section 2(B), Appendix at A16.

11. Appendix at A20.

of the Ohio Supreme Court's Rules of Practice,[12] all of Cleveland's assignments of error filed in the Court of Appeals were set forth in the appendix to its brief on the merits.

One of the propositions of law proposed by Cleveland in its brief on the merits in the Supreme Court of Ohio was: "Layoffs of civil service employees necessitated by lack of funds and made in accordance with those charter provisions and civil service rules relating to layoff procedure may not be enjoined."

Petitioners (plaintiffs-appellees below) countered with the proposition that "the mayor of a charter city may be enjoined from laying off regularly appointed civil service employees *as a gross abuse of discretion* when such layoffs are not in accordance with the charter." (Emphasis added.)

In its Reply Brief in the Supreme Court of Ohio, the City responded that, in view of the City's undisputed financial straits, laying off fewer than three percent of the City's police force, including 52 rookies who had been on the streets for only a few days, "does not constitute the *gross* abuse of discretion which would warrant the trial court's stripping the Mayor of his vested authority. The courts below were wrong as a matter of law in enjoining the layoffs of the 53 police officers."

Some two months later, on March 3, 1982, the merits of this issue were argued by all parties before the Supreme Court of Ohio.

In its opinion, announced May 26, 1982, the Supreme Court of Ohio reversed the lower court's ruling on the abuse of discretion issue and held:

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12. Appendix at A24.

> As previously noted, the trial court found that the proposed layoffs of 53 police officers jeopardized the city's health, safety, morals, and welfare. As a matter of law, we cannot accept the trial court's conclusions regarding the effect of the proposed layoffs on the city's health, safety, morals, and welfare. The proposed layoffs contemplated removal of one experienced officer and 52 rookies who had recently completed training at the Police Academy. Appellants plausibly assert that "(f)or a municipality in virtual bankruptcy, the layoff of 53 officers * * * from a police force of 1871 does not constitute the *gross* abuse of discretion which would warrant the trial court's stripping the Mayor of his vested authority." We agree with appellants that the contemplated layoffs, which were predicated on the city's exigent financial circumstances, did not constitute a gross abuse of discretion. Unquestionably, the layoffs would have had an adverse effect on the police department's ability to serve the public. Nevertheless, the record does not support the conclusion that the negative impact of this relatively modest number of layoffs would have been so severe as to result in the "functional paralysis" of the police department envisaged by the trial court. (Emphasis in bold type added.)
>
> *McNea v. Voinovich* (1982), 70 Ohio St. 2d 117, 435 N.E.2d 420, reproduced in Appendix to Petition at A6, A7.

The court expressly noted that the rulings of the courts below appeared to be an attempt to evade its earlier holding in *Gannon v. Perk* (1976), 46 Ohio St. 2d 301, 313, 348 N.E.2d 342, 350 (*"Gannon II"*).

> The trial court's finding on the safety issue and the Court of Appeals' summary affirmance thereof is an expedient to avoid this court's holding in *Gannon II*, at page 313, that "the Charter of the City of Cleveland does not confer upon its safety forces a preferred priority over other civil service employees in the event layoffs are necessitated by reasons of economy." The rule of *Gannon II* is susceptible of evasion if trial courts routinely find that laying off safety personnel jeopardizes a community's health, safety, morals, and welfare.
>
> *McNea v. Voinovich, supra*, Appendix to Petition at A7.

Petitioners then filed a motion for rehearing, claiming that, in deciding the abuse of discretion issue, the Supreme Court of Ohio had deprived them of due process of law. That motion was unanimously overruled, and on June 23, 1982, the Supreme Court of Ohio issued its mandate reversing the judgment of the Court of Appeals in its entirety. On September 15, 1982, petitioners filed their petition for a writ of certiorari in this Court, which respondents received on September 20, 1982.

REASONS FOR DENYING THE WRIT

Few issues are so inherently a matter of state law as the standard of "gross abuse of discretion" of local officials. Yet, on the foregoing record, petitioners attempt to make a federal case out of this common law issue by asserting that they were denied their day in court. Nothing could be further from the truth, factually or legally. Moreover, proposed layoffs to balance Cleveland's *1981 budget* are as moot as moot can be.

1. Petitioners Suffered No Due Process Deprivation at the Hands of the Supreme Court of Ohio.

In their petition for writ of certiorari, petitioners assert that the Supreme Court of Ohio raised this issue *"sua sponte"* (at pp. i and 5), that the Court "had no record containing the evidence . . ." (at pp. 6, 10), and that the Court considered the issue "in the absence of a complete record" (at p. 12).

As respondents' Statement of the Case demonstrates, not only was the abuse of discretion issue briefed and argued in the Supreme Court of Ohio, but also the entire trial transcript was before that Court in the record of this case. This is in marked contrast to the cases cited by petitioners. None of those cases had a complete record. *In re Furnishings for Courtroom Two* (1981), 66 Ohio St. 2d 427, 423 N.E.2d 86 (no trial transcript or exhibits), *Beach v. Sweeney* (1958), 167 Ohio St. 477, 150 N.E.2d 42 (no trial transcript or exhibits), *Lynch v. Doran* (1968), 13 Ohio St. 2d 9, 233 N.E.2d 518 (only partial trial transcript), and *Ostrander v. Parker-Fallis* (1972), 29 Ohio St. 2d 72, 278 N.E.2d 363 (only partial trial transcript).

However, as petitioners candidly concede at page 10 of their petition, "the Ohio Supreme Court . . . can raise and determine errors in the record which they discover but which have not been specifically raised by appellants." Therefore, even if the City had *never* briefed or argued the issue, the Supreme Court of Ohio could properly have reached the identical result. As a matter of law, petitioners are charged with knowledge of that longstanding procedure of the Supreme Court of Ohio.

Long ago in *Chicago Ornamental Iron Co. v. Rook* (1915), 93 Ohio St. 152, 112 N.E. 589 (second paragraph of syllabus), the Court held "a cause properly in this court

is here for the determination of all questions presented by the record." That principle has frequently been pronounced by the Supreme Court of Ohio. *See Winslow v. Bus Co.* (1947), 148 Ohio St. 101, 73 N.E.2d 504, quoting *Rook* and citing three other Supreme Court cases.

As the Supreme Court of Ohio held in *Barsan v. Pioneer Savings & Loan* (1955), 163 Ohio St. 424, 127 N.E.2d 614, first paragraph of syllabus:

> 1. Where all the evidence considered by a trial court has been incorporated in a bill of exceptions, the Supreme Court can, without weighing the evidence, disregard the findings of the trial court on a particular factual issue if the evidence requires a different finding as a matter of law on such factual issue.

In the instant case, the Supreme Court of Ohio decided this common law issue *as a matter of law*. Petitioners had no federal constitutional right to expect a different result.

2. The Police Layoffs Proposed for Cleveland in January 1981 As a 1981 Budget-Balancing Measure Are Moot.

Obviously, the issue of the propriety of police layoffs to balance Cleveland's 1981 budget is moot. However, pursuant to the requirement of *Fusari v. Steinberg*, 419 U.S. 379, 95 S.Ct. 533, 42 L. Ed. 2d 521 (1975), Cleveland sets forth additional facts to confirm that mootness.

In late February of 1981 the voters of Cleveland increased the City's income tax rate from one and one-half percent to two percent. That obviated the necessity of laying off any police officers. The 1981 general fund budget was balanced by increased revenues. The financial

condition of the City of Cleveland in early 1981 is now history.

The layoff notices issued to the particular police officers in December of 1980 are now legal nullities. Some 250 new patrol officers have been appointed in the interim. Therefore, the fifty-three patrol officers who received the layoff notices challenged by petitioners are no longer the fifty-three patrol officers with the least seniority in their civil service classification. *See* Rule 8.20 of the Cleveland Civil Service Commission, Appendix A at A27, requiring employees with the least seniority in a particular civil service classification to be layed off first.

The particular police layoffs petitioners challenged never took place and with the passing of 1981 can never take place. The issue is moot.

CONCLUSION

As a matter of fact and law, petitioners had all the process they were due in the consideration of this Ohio common law issue. The complete record refutes petitioners' claim. Ohio appellate procedure was fully adhered to.

The proposed 1981 layoffs of police officers to balance Cleveland's 1981 budget are now moot.

Petitioners in fact won by tying up the layoffs in court.

This Court should not waste its time speculating on a common law issue which has become moot.

The petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES E. YOUNG
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Comfort and Nied

APPENDIX

ORDER OF THE SUPREME COURT OF OHIO ALLOWING MOTION TO CERTIFY

No. 81-1108

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

WILLIAM J. McNEA *et al.*,
Appellees,

vs.

GEORGE VOINOVICH *et al.*,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is allowed.

PRAECIPE OF CITY DEFENDANTS

EIGHTH DISTRICT COURT OF APPEALS—LOCAL RULE NO. 4

Trial Court Case No.: 20649

Date of Praecipe January 15, 1981

Date of Final Judgment in Trial Court January 15, 1981

Date of Filing of Notice of Appeal January 15, 1981

Date on Which Motion for New Trial or Motion for Judgment N.O.V. Was Journalized

.....

WILLIAM J. McNEA, et al.,
Plaintiffs

vs.

GEORGE VOINOVICH, et al.,
Defendants

TO THE CLERK OF THE TRIAL COURT:

Immediately prepare and assemble the original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries.

The record in this appeal will include the following:

(CHECK APPROPRIATE BOXES, IF APPLICABLE)

[x] 1. Original papers and exhibits filed in the trial court and a certified copy of the docket and journal entries.

In addition the record will include:

[x] 2. Complete transcript under Rule 9(B).

[ ] 3. Partial transcript under Rule 9(B).

[ ] 4. Statement of evidence or proceedings under Rule 9(C).

[ ] 5. Agreed statement under Rule 9(D).

NOTICE:

[x] The judgment in the trial court involved multiple claims or parties.

[ ] A motion for judgment under Civil Rule 50(B) and/or motion for a new trial under Civil Rule 59 have been filed in the trial court and have not yet been journalized. (Please Check if appropriate.) Appellant *must immediately notify* the clerk of the court of appeals when the ruling on aforementioned motion is journalized, and place the date in the space provided in this praecipe.

.....

Attorney for City Defendants

NOTE: If there is an outstanding motion for a new trial or motion for judgment under Civil Rules 50 and 59, the appeal will not be docketed until the ruling on said pending motion is journalized and the clerk of the court of appeals notified.

NOTE: If a notice of appeal is prematurely filed before judgment is entered (Journalized) under Appellate Rule 4(A), or before ruling on a motion filed under Civil Rule 50 or 59, for a period greater than 90 days, the notice of appeal will be summarily docketed and then dismissed. Appellant may file a second notice of appeal within 30 days after a judgment has been entered or there has been a ruling on said motion.

Praecipe must be prepared in Triplicate—One Copy for Trial Court, One copy forwarded to Court of Appeals, with copy of Notice of Appeal attached, and a copy to the opposing party, with Notice of Appeal attached. If there is more than one party, each should be served with the Praecipe, copy of Notice of Appeal attached.

OHIO REVISED CODE

5705.39 Appropriations limited by estimated revenue

The total appropriations from each fund shall not exceed the total of the estimated revenue available for expenditure therefrom, as certified by the budget commission, or in case of appeal, by the board of tax appeals. No appropriation measure shall become effective until the county auditor files with the appropriating authority and in the case of a school district, also files with the superintendent of public instruction, a certificate that the total appropriations from each fund, taken together with all other outstanding appropriations, do not exceed such official estimate or amended official estimate. When the appropriation does not exceed such official estimate, the county auditor shall give such certificate forthwith upon receiving from the appropriating authority a certified copy of the appropriation measure, a copy of which he shall deliver to the superintendent of public instruction in the case of a school district. Appropriations shall be made from each fund only for the purposes for which such fund is established.

OHIO RULES OF APPELLATE PROCEDURE

Rule 9

THE RECORD ON APPEAL

(A) Composition of the record on appeal. The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App.R. 9(B), shall constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented and append such copy of the portions of the transcripts to their briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means.

(B) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered. At the time of filing the notice of appeal the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record and shall file a copy of said

order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonogramic or photographic means, or by the use of audio electronic recording devices, or by the use of video recording systems. If there be no officially appointed reporter, Rule 9(C) or 9(D) may be utilized. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, he shall include in the record a transcript of all evidence relevant to such findings or conclusion. Unless the entire transcript is to be included, or if no transcript is necessary, or if a statement pursuant to either Rule 9(C) or 9(D) is to be prepared in lieu of a transcript, the appellant shall, with his notice of appeal, file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript which he intends to include in the record or a statement that no transcript is necessary or that a statement pursuant to either Rule 9(C) or 9(D) will be submitted, and a statement of the assignments of error he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within ten days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

If the appellant shall refuse, or fail within ten days after service upon him of appellee's designation, to order such parts, the appellee within five days thereafter, shall either order the part in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so. At the time of ordering, a party shall

arrange for the payment to the reporter of the cost of the transcript.

The reporter shall certify the transcript as correct whether in written or videotape form and state whether it is a complete or partial transcript, and, if partial, indicate the parts included and the parts excluded.

If the proceedings were recorded in part by videotape and in part by other media, the appellant shall order the respective parts from the proper reporter and the record is complete for the purposes of appeal when the last such part is filed with the clerk of the trial court.

(C) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to Rule 10, who may serve objections or propose amendments thereto within ten days after service. Thereupon, the statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act thereon prior to the time for transmission of the record pursuant to Rule 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

(D) Agreed statement as the record on appeal. In lieu of the record on appeal as defined in subdivision (A) of this rule, the parties may, no later than ten days prior to the time for transmission of the record pursuant

to Rule 10, prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the trial court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court prior to the time for transmission of the record pursuant to Rule 10, shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the trial court within the time provided by Rule 10.

(E) Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

LOCAL RULES OF THE EIGHTH APPELLATE JUDICIAL DISTRICT

Rule 4

THE RECORD

A. The clerk of the trial court shall not prepare and assemble the documents constituting the record on appeal, as defined in Appellate Rule 9(A), unless and until appellant has filed a praecipe.

If the appellant fails to file a praecipe within 10 days of filing the notice of appeal in the trial court, it will be grounds for dismissal of the appeal. A copy shall be served on the opposing party or parties.

The appellant shall file with the notice of appeal a praecipe directing the clerk of the trial court to prepare a record of the original papers and exhibits thereto, and a certified copy of the docket and journal entries as specified in Appellate Rule 9(A). In addition, the praecipe shall state whether or not the portion of the record outlined about will be supplemented with a transcript of proceedings, other statement of the evidence or proceedings, or agreed statement all as defined in paragraphs (B), (C), and (D) of Appellate Rule 9 as the record on appeal.

If the praecipe states that the appellant will rely only on the original papers and transcript of the docket and journal entries as the record on appeal, the clerk shall transmit such record forthwith to the clerk of the Court of Appeals. If a transcript of proceedings is to be filed in accordance with Rule 9(B), the copy of the notice of appeal with the praecipe shall be filed with the clerk of the trial court with dated proof of service upon the court reporter. The appellant, however, shall be respon-

sible for contacting and ordering the transcript of proceedings from the court reporter and for the filing of such transcript of proceedings with the clerk of the trial court and its transmission to the clerk of the Court of Appeals in accordance with Appellate Rule 9(B). Appellate Rule 9(B) describes a court reporter as "the person appointed by the court to transcribe the proceedings . . . ." When a reporter is used to record the events at trial, the record must reflect that reporter's appointment by the trial court for such purpose. If an official court reporter is not then under contract to the court the Court shall appoint a professional court reporter on a case by case basis. This may be done by sua sponte entry of the court or on motion of a party in the case.

If the appellant intends to urge on appeal that the assignment of error or errors can be exemplified by the original papers with exhibits attached filed in the trial court and a certified copy of the docket and journal entries prepared by the clerk of the trial court, without a transcript of the evidence, he shall notify and serve on the appellee a description of his intentions in the same manner as required by Rule 9(B) when an appellant intends to rely on a partial transcript of the evidence to demonstrate the errors.

B. If a transcript of proceedings [Appellate Rule 9(B)] is necessary to portray the errors to be assigned on the appeal, it is the appellant's responsibility to have the transcript or a statement of the evidence or proceedings [Appellate Rule 9(C)] timely prepared and delivered to the clerk of the trial court for transmission to the clerk of the Court of Appeals. This transcript or partial transcript, or statement of the evidence together with the original papers and attached exhibits, if any, filed in the trial court and a certified copy of the docket and journal

entries which, at the direction of the appellant, are assembled, prepared, and transmitted to the Court of Appeals by the clerk shall constitute the record.

C. It is also the appellant's responsibility to have prepared, settled, and approved by the trial judge, and delivered to the clerk of the trial court an agreed statement [Appellate Rule 9(D)], if such agreed statement is to be used in lieu of the record.

D. Failure of the appellant to file a praecipe, to secure the transmission of the docket and journal entries and to arrange for the transmission of the transcript of proceedings, shall be construed as a failure to prosecute the appeal and be grounds for dismissal.

The record shall be deemed to be complete for the purpose of appeal and the clerk of the trial court shall transmit the record to the clerk of this court, pursuant to Appellate Rule 10, when any of the following circumstances occur:

1. Original papers and exhibits are filed in the trial court with a certified copy of the docket and journal entries in that court. This will occur if the praecipe does not indicate that there will be a verbatim transcript of proceedings, either complete or partial, App.R. 9(B); a statement of the evidence, App. R. 9(C); or an agreed statement, App.R. 9(D); or if the appellee has not filed a designation of additional parts of the transcript to be included in the record, App.R. 9(A).

OR

2. Original papers and exhibits are filed in the trial court, with a certified copy of the docket and journal entries in that court and either a complete or partial verbatim transcript of testimony, App.R.

9(B); or a statement of the evidence and record, App. R. 9(C); or an agreed statement, App.R. 9(D).

If there will be a complete or partial verbatim transcript of proceedings, or a statement of the evidence or an agreed statement, then the record shall be deemed to be complete when any of the following circumstances occur:

(a) When the transcript of proceedings is filed with the Clerk of the trial court, App.R. 9(B); or

(b) When the appellant's praecipe designates that a part of the transcript of proceedings is to be included in the record and such designations, with counter-designations of the transcript of proceedings, if any, have been filed with the Clerk, App.R. 9(B); or

(c) When a statement of the evidence or proceedings is settled and approved by the trial court, and journalized, App.R. 9(C); or

(d) When an agreed statement is approved by the trial court and journalized, App.R. 9(D).

E. Unless appellant indicates in the praecipe [Appellate Rule 9(B)] that no part of the transcript of proceedings is to be included in the record, failure of appellant to cause to be filed either a transcript of proceedings (either complete or partial), a statement of the evidence or proceedings settled and approved by the trial court [Appellate Rule 9(C)], or an agreed statement settled and approved by the trial court [Appellate Rule 9(D)] within the time allowed or extended for transmission of the record, shall be deemed grounds for dismissal of the appeal [Appellate Rules 3(A) and 11(C)].

OHIO RULES OF APPELLATE PROCEDURE

Rule 16

BRIEFS

(A) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where they are cited.

(2) A statement of the assignments of errors presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings and its disposition in the court below. There shall follow a statement of the issues presented for review and a statement of the facts relevant to the issues presented for review, with appropriate references to the record [see subdivision (D)].

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the assignments of error presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

(5) A short conclusion stating the precise relief sought.

(B) Brief of the appellee. The brief of the appellee shall conform to the requirements of subdivision

(A) (1) through (A) (4), except that a statement of the case or of the facts relevant to the assignments of error need not be made unless the appellee is dissatisfied with the statement of the appellant.

(C) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the assignments of error presented by the cross-appeal. No further briefs may be filed except with leave of court.

(D) References in briefs to the record. References in the briefs to parts of the record shall be to the pages of the parts of the record involved; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. If reference is made to evidence, the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

(E) Reproduction of statutes, rules, regulations. If determination of the assignments of error presented requires the consideration of provisions of constitutions, statutes, ordinances, rules or regulations, the relevant parts thereof shall be reproduced in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

OHIO CONSTITUTION, ARTICLE IV, § 2

§2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B)(1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the court of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

OHIO SUPREME COURT RULES OF PRACTICE

Rule II

DETERMINATION OF JURISDICTION ON APPEALS FROM COURTS OF APPEALS

Section 1. Effect of Failure to Comply with Required Filing of Notice of Appeal in Supreme Court

If a copy of the notice of appeal is not filed or offered for filing in the Supreme Court in compliance with Sections 1, 2, 3, 5, 6 and 7 of Rule I, the Supreme Court may refuse to accept such copy for filing or may dismiss the appeal, either on its own motion or on motion of a party, for lack of prosecution.

Section 2. Notice of Appeal Filed in the Supreme Court Considered as Motion to Certify or for Leave to Appeal

Where the order, judgment or decree of the Court of Appeals that is appealed from was rendered in an action not originating in the Court of Appeals, the copy of the notice of appeal filed in the Supreme Court will be considered as a motion for leave to appeal in a felony case or as a motion to certify in any other case. No separate motion to certify or for leave to appeal need be filed.

Section 3. Consideration as to Existence of Constitutional Question

(A) If an appellant contends that a case involves a substantial constitutional question and also contends that such case is of public or great general interest, it is necessary to file only one notice of appeal. (See Rule I(A) (a) and (c).)

(B) Where an appellant claims that he has an appeal as of right (*i. e.*, that the case involves a constitutional question), the Supreme Court will, *sua sponte*, consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

Section 4. Memorandum in Support of Claimed Jurisdiction of Supreme Court

(A) A motion to certify, a motion for leave to appeal or a claimed appeal as of right shall be supported by a memorandum which shall contain:

(1) The same matters required in a brief on the merits (Rule V, Section 1) except that any argument should be limited to presenting with accuracy, brevity and clarity only what is essential to a ready and adequate understanding of the proposition of law to which it relates and why that proposition should be adopted.

(2) Only to the extent not indicated by such propositions of law and such argument, a concise statement of why the case is of public or great general interest, why a substantial constitutional question is involved or why leave to appeal should be granted, such statement to follow the argument.

(B) The failure of appellant to present with accuracy, brevity and clarity whatever is essential to a ready and adequate understanding of the questions requiring consideration will be sufficient reason for denying the motion to certify or for leave to appeal or for dismissing an appeal as of right on the ground that no substantial constitutional question is involved.

Unless the "statement of the propositions of law presented" clearly states some proposition of law which could serve as a syllabus, the court may dismiss any motion or appeal *sua sponte*.

(C) The body of the brief should be confined to the minimum number of pages necessary to accurately and clearly present the reasons why the case is of public or great general interest or why leave to appeal should be granted or why a substantial constitutional question exists and should seldom exceed thirty pages.

Section 5. Number of Copies and Service of and Time for Filing Memorandum

Twelve copies of such memorandum, together with proof of service of copies thereof on all other parties or their attorneys of record, must be filed in the Supreme Court at the same time that the notice of appeal is filed therein pursuant to Rule I, Section 1 (B).

Section 6. Memorandum Opposing Jurisdiction of the Supreme Court

Within 30 days after the filing of the notice of appeal in the Supreme Court, appellee shall file a memorandum opposing jurisdiction. Twelve copies of such memorandum, together with proof of service of copies thereof on all other parties or their attorneys of record, must be filed at the same time that such memorandum is filed. Such memorandum shall be prepared in the same form as the appellant's memorandum, and the appellee shall state propositions of law which would support judgment in his favor. Appellee shall include in the appendix of such memorandum a complete copy of any cited statute, constitutional provision, etc., unless it is already set forth in the appellant's memorandum.

Section 7. Formal Requirements

Each memorandum filed pursuant to Sections 4, 5 and 6 of this rule must conform with the requirements of Rule VI.

Section 8. Procedure on Appeal in Felony Case Where Notice of Appeal is Not Filed as Specified

In those cases where the time has expired for the filing in the Court of Appeals or in the Supreme Court of a notice of appeal in a felony case, adequate reasons for the delay in such filing must be given and, where based upon facts, those facts must be evidenced by affidavit or deposition filed in support of such motion for leave to appeal.

Section 9. Record Not to be Sent to Supreme Court Until Appeal Allowed

Except in those cases originating in the Court of Appeals, and in those cases in which the death penalty has been affirmed, unless otherwise ordered and notwithstanding R.C. 2505.08, neither the original papers nor the transcript of proceedings shall be transmitted to the Supreme Court, unless and until a motion to certify the record has been granted or a motion for leave to appeal has been granted or, in the case of an appeal as of right, unless and until the court has overruled the motion to dismiss referred to in Section 3 of this rule.

Section 10. Record to be Sent to Supreme Court After Jurisdiction Determined

Upon the allowance of a motion to certify the record or for leave to appeal or, in the case of a claimed appeal as of right, on the overruling of the motion to dismiss referred to in Section 3 of this rule, the Clerk of this Court shall issue

an order to the Court of Appeals requiring the clerk of that court to prepare a transcript of the docket and journal entries in such cause in that court, upon being paid by the appellant the lawful fees therefor, and to transmit the transcript and all the papers in the case, duly certified, to the Clerk of the Supreme Court within ten days.

Rule V

BRIEFS ON MERITS IN APPEAL CASES

Section 1. Appellant's Brief

The appellant in all civil cases must file eighteen copies of a brief within ten days of the date the copies of the record are filed with the Court. The appellant in all criminal cases must file eighteen copies of a brief within forty days of the date of the allowance of the appeal.

The appellant's brief must comply with Rule VI and contain:

(A) A table of contents listing the table of authorities, statement of facts, argument (with the proposition or propositions of law and authorities relied upon to support the same) and appendix, all as required by the following subparagraphs of this rule, with references to the pages of the brief where each appears, and arranged as shown by the following sample:

[SAMPLE]

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES [if required, see Section 1(B) of this rule.] 1

STATEMENT OF FACTS 2

[May be divided between statement of the case and statement of facts. Appellee should confine his statement to differences between the parties or to additional material.]

ARGUMENT 3

[Sample proposition of law taken from first paragraph of syllabus of Bureau of Support v. Kreitzer (1968), 16 Ohio St.2d 147, 243 N.E.2d 83.]

Proposition of Law No. 1:

The duty of the state of Ohio to support inmates (or patients) of benevolent institutions under the jurisdiction of the Department of Mental Hygiene and Correction, as set forth in R.C. 5121.01, is qualified by R.C. 5121.03 *et seq.*, so that the nature of its liability for support is secondary. Primary liability for such support, at least in the case of a patient without dependents, rests absolutely upon the patient himself, by virtue of R.C. 5121.04(B) (1), or upon his estate. 3

Authorities cited in support of Proposition of Law No. 1: [in the order in which they appear in the brief] State, ex rel. Price v. Huwe (1922), 105 Ohio 304, 137 N.E. 167 3

State v. Kiesewetter (1882), 37 Ohio St. 546 3
R.C. 5121.01 4
R.C. 5121.10 4
R.C. 5121.04(B) (1) 4
R.C. 5121.03 5
Lackmann v. Dept. of Mental Hygiene, 156 Cal.App.2d 674, 320 P.2d 186 5

[If desired, the argument under each Proposition of Law may be subdivided. Appellee shall state the proposition in the form which would, if adopted, support judgment in his favor.] 7

Proposition of Law No. 2:

[State with successive numbers, each, if any, additional propositions relied upon.]

APPENDIX

Notice of Appeal to the Supreme Court 9
Assignment of error filed in the Court of Appeals 10
Opinion of the Court of Appeals 11
Journal Entry of the Court of Appeals 13
Opinion of the Court of Common Pleas (or BTA or PUCO) 14
Journal Entry of the Court of Common Pleas (or BTA or PUCO) 16
R.C. 5121.01 17
R.C. 5121.03 17
R.C. 5121.04 19
R.C. 5121.10 19

[Note: All of the above mentioned documents must be included in the appellant's brief. They shall not be repeated in the printed record or appellee's brief.]

(B) If the total number of separate citations exceeds twelve (12), a table of authorities listing all cases or other authorities, arranged alphabetically, and all statutes, constitutional provisions, and departmental, board or commission regulations relied upon, with references to the pages of the brief where each citation appears.

(C) A statement of the facts with page references, in parentheses, to supporting portions of the printed or nonprinted record and of the original transcript of testimony. (Obviously, in a memorandum under Rule II, Section 4, references to a printed or nonprinted record cannot be made.)

(D) An argument, which shall be headed by the proposition of law which the appellant contends is applicable to the facts in the case and which, if he prevails, could serve as a syllabus. See paragraph three of the syllabus of Drake v. Bucher, Supt. (1966), 5 Ohio St.2d 37, 213 N.E.2d 182. If several propositions of law are contended for, the argument shall be divided by utilizing each proposition as a subheading.

(E) An appendix containing (a) a copy of the notice of appeal to the Supreme Court, (b) a copy of the assignments of error filed in the Court of Appeals, (c) a copy of the judgment or order appealed from, (d) copies of all judgments, orders, and opinions rendered by any court or board in the case, (e) complete copies of any unreported cases cited, (f) the rules or regulations of any department, board, commission or any other agency relied upon (such rules shall be set forth in full, or if too voluminous, a copy thereof shall be furnished with each copy of the brief), and (g) a copy of any statute or constitutional provision relied upon, to be construed or otherwise involved in the case. The pages of the appendix shall be numbered.

(F) If it is necessary to file multiple appeals from a single decision of a Court of Appeals or an administrative agency and such appeals are docketed under separate case numbers, counsel for the appellants should, whenever possible, file a single brief or memorandum for all such appeals. The cover page of such brief or memorandum should contain the names and numbers of each case.

Section 2. Brief Opposing Appeal

Within thirty days of the filing of appellant's brief, the party opposing the appeal shall file a brief in form complying with the provisions of this rule and Rule VI and answering the appellant's contentions and making any other contentions deemed appropriate as reasons for affirmance of the order or judgment appealed from.

Section 3. Reply Briefs

Any reply brief must be filed within twenty days after the filing of appellee's brief and must comply with Rule VI as to form.

Section 4. Additional Authorities

In all cases where the briefs filed in compliance with these rules do not contain all the authorities on which counsel intends to rely, there must be filed a brief statement of additional authorities. This statement should be filed at least five days before oral argument.

Section 5. Briefs Amicus Curiae

Briefs amicus curiae conforming to the requirements of this section may be filed with leave of Court. Any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support.

Section 6. Proof of Service

Service of a copy of each brief or statement of additional authorities shall be made upon opposing counsel forthwith, and proof of service shall be filed with the Clerk.

Section 7. Additional Docket Fee Where Appeal Allowed

Where a motion to certify has been allowed, or motion for leave to appeal has been granted, the appellant must pay an additional docket fee of five dollars on the filing of his brief.

RULES OF THE CLEVELAND CIVIL SERVICE COMMISSION

8.20. Lay-Offs. Whenever it becomes necessary to reduce the working force in a classification in any division of the city service, the appointing authority may lay off any appointee in such classification; provided, however, that where two or more persons are employed in a classification, they shall be laid off in the inverse order of their appointment in such classification, unless otherwise first approved by the commission for good cause shown and, provided, further that no lay-offs shall be affected or influenced by politics, religion, or race; and provided further that no lay off shall be used as a substitute for disciplinary action. In every case of lay-off, the appointing authority is hereby required to notify the commission, and the employee being laid off, immediately in writing, and to state therein the reasons for such lay-off. The procedure for accomplishing lay-offs and subsequent eligibility for re-employment shall be as set forth in Rules 8.21 through 8.23 inclusive.